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In the Supreme Court of the United States

OCTOBER TERM, 1974

ADOLPH COORS COMPANY,
Petitioner

vs.

FEDERAL TRADE COMMISSION,
AN AGENCY OF THE FEDERAL GOVERNMENT
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

ADOLPH COORS COMPANY,
Petitioner

vs.

FEDERAL TRADE COMMISSION,
AN AGENCY OF THE FEDERAL GOVERNMENT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Adolph Coors Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 21, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals in this case, not yet officially reported, is set forth as Appendix A to this Petition. The Opinion and Order of the Federal Trade Commission, also not yet officially reported, is set forth as Appendix B hereto. The Opinion and Order of the Administrative Law Judge which was reversed by the Federal Trade Commission is not yet officially reported and is set forth as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a manufacturer's assignment of vertically imposed exclusive marketing territories to its distributors is illegal *per se* under Section 5 of the Federal Trade Commission Act and the antitrust laws, and, therefore, not subject to the Rule of Reason.

2. Whether the Substantial Evidence Test governing court review of federal agency proceedings under the Federal Administrative Procedure Act permits court review of only the evidence in support of the agency action and order and not the evidence which fairly detracts from same, and whether such court review denies Coors its right to due process of law under the Fifth Amendment to the Constitution of the United States of America.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

This action involves the Fifth Amendment to the Constitution of the United States of America; the Federal Administrative Procedure Act, 5 U.S.C. §551 et. seq.; the Federal Trade Commission Act, as amended, 15 U.S.C. §41 et. seq.; and Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission, 16 C.F.R. §3.51 et. seq. and especially §§3.51 (a), (b) and (c), 3.54 (a) and (b). Pertinent excerpts from these statutes, rules and constitutional provisions are set forth in Appendix D hereto.

STATEMENT OF THE CASE

The jurisdiction of the United States Court of Appeals for the Tenth Circuit below was invoked pursuant to the authority of the Federal Trade Commission Act, 15 U.S.C. §45(c). This section of that Act authorized the Adolph Coors Company to

petition that Appellate Court for an order to set aside the decision of the Federal Trade Commission in this matter.

Through its attorneys ("Complaint Counsel") the Federal Trade Commission filed a Complaint against the Adolph Coors Company, hereinafter referred to as "Coors," on June 7, 1971, alleging that Coors had committed certain unfair practices proscribed by the Federal Trade Commission Act, 15 U.S.C. §45(a) (1) and (b). The unlawful acts and practices charged in the Complaint were that Coors:

1. fixed and controlled the prices at which its distributors and retailers sell Coors beer;
2. unlawfully imposed territorial restrictions on its distributors;
3. required its distributors to require that their retailers serve Coors draught beer exclusively, or not at all;
4. unlawfully prohibited its distributors from selling and delivering beer to central warehouse accounts; and
5. unlawfully included thirty- and five-day cancellation periods in all its distributor contracts; and restrained its distributors from freely selling their distributorships to purchasers of their own choosing and at prices freely determined by the seller and buyer.

Extensive hearings were held before an Administrative Law Judge from February 14, 1972, to March 14, 1972, in Denver, Colorado. On September 15, 1972, the Administrative Law Judge rendered an initial decision in favor of the Adolph Coors Company on every complaint allegation and dismissed the Complaint.

Complaint Counsel then appealed the initial decision of the Administrative Law Judge to the 5-member Federal Trade Commission. After oral argument before the Commissioners, they completely substituted their own findings of fact and conclusions of law for those of the Administrative Law Judge and rendered their own decision, finding in favor of Complaint Counsel on every issue alleged in the Complaint.

The Commission decision and order, issued July 24, 1973, were served upon the Adolph Coors Company on August 6, 1973. Coors filed the Petition to Set Aside in the United States Court of Appeals for the Tenth Circuit on August 15, 1973.

The United States Court of Appeals for the Tenth Circuit heard oral argument on the petition of the Adolph Coors Com-

pany to review and set aside the order of the Federal Trade Commission on March 19, 1974. That Court subsequently issued its opinion in the matter set forth in Appendix "A" hereto which enforced paragraphs 1 through 11 of the Federal Trade Commission's order. The Court reluctantly held vertical exclusive territorial assignments to be *per se* illegal, but suggested this Court graft an exception to that rule to accommodate the unique Coors facts, *infra*. The Court set aside paragraphs 12 and 13 of the said Federal Trade Commission order. In summary, that Court action affirmed the Federal Trade Commissioners' findings on each of the complaint allegations except those dealing with the contractual cancellation periods.

Basic Facts

The basic facts of this matter are that the Adolph Coors Company is currently the fourth largest brewer in the United States, but it is far behind the big three of Anheuser-Busch, Inc., Jos. Schlitz Brewing Company, and the Pabst Brewing Company (Tr. 2852, RX 1057S).[1] Coors competes with every brand of beer sold (Tr. 2851). Competition in the beer industry has been so severe that the number of breweries has dropped from 750 in 1935 to about 70 in 1971 (Tr. 2845); by 1980 the number is expected to be only 20 (Tr. 2881). In fact, if the top three brewers in America – Budweiser, Schlitz, and Pabst – continue their present rate of growth, they alone will fulfill all the total beer requirements of the United States by 1985 (Tr. 2881-2882).

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[1] "Tr." refers to the official transcript of testimony taken at the hearing before the Administrative Law Judge. That testimony, relevant here, is found in Volumes II through V of the Joint Appendix to the Briefs submitted to the Court of Appeals below. The Joint Appendix Volumes I through V, being the complete printed appendix, were certified to this Court as the record from the Court below by the Clerk, U.S. Court of Appeals for the Tenth Circuit.

"RX" refers to the Respondent's (Coors') Exhibits at the Hearing before the Administrative Law Judge. "CX" refers to the Commission's Exhibits at that Hearing. These Exhibits, relevant here, are found in Exhibit Volumes I through VII, inclusive, made a part of the Joint Appendix below, and were included in the certification of the record by the Clerk, U.S. Court of Appeals for the Tenth Circuit.

Coors, a single-plant, "regional" brewer, is the only "shipping" brewery left in America. In 1971 the average barrel of Coors beer traveled 961 miles to its market place (Tr. 2853) comprised of Arizona, California, Colorado, Idaho, Kansas, Nevada, New Mexico, Oklahoma, Texas (some counties only), Utah, and Wyoming. Population trends of the United States show a gravitation to this part of America.

The only way Coors has been able to compete is by selling a quality product, minimizing marketing costs, achieving better market penetration than its competitors, and by minimizing its advertising costs to offset its freight disadvantage (Tr. 2889). Coors markets its product today in the same basic area in which it was marketed in 1935 (Tr. 2875-2876). Coors' advertising costs in 1971 were less than $1.00 per barrel, whereas the advertising costs for Anheuser-Busch or Schlitz have been $4.00 and up (Tr. 2853). In 1948 Coors was the 49th largest brewer in America (RX 1057A). Its progress to 4th ranking is very recent. Coors reached the top 10 breweries only in 1963 (RX 1057L) and 4th place only in 1969 (RX 1057R). Absolutely uncontroverted is the fact that quality is the only thing selling Coors beer (Tr. 2896).

The quality of the product starts with the basic ingredients of water, hops, barley, and rice (Tr. 2846-2847, 2850; RX 169, p. 28; RX 172, p. 30; RX 1155D). Based on the costs of raw materials, production, and packaging, Coors beer is by a substantial margin the most expensive made in America (Tr. 2851; RX 169, p. 32). Coors' quality continues with the Coors brewing process, which takes 80 days, compared with 20 days for that of its competitors (Tr. 2855). Using the aseptic brewing process, Coors does *not* pasteurize its beer; conversion to the aseptic process, started in 1959, took 8 years to complete (Tr. 2856). The elimination of pasteurization is essential in the refrigerated marketing concept (Tr. 2857), a quality control program used by Coors, the only brewer in America using it (Tr. 2858). Refrigerated marketing means that the beer is produced by the aseptic process in an air conditioned brewery; is shipped in refrigerated or insulated cars (Tr. 2866); is kept under refrigeration at the distributor's warehouse (Tr. 2874; RX 1047G, para. 12); is delivered to retail accounts by the distributors in insulated or refrigerated trucks (Tr. 2875; RX 1047G, para. 13); and, to the maximum extent possible, is

sold under refrigerated conditions at the retail account level. Because beer produced in this manner is very delicate, it must reach the consumer promptly (Tr. 2866-67). Consequently, Coors requires its shippers and distributors to move its beer to the consumer as rapidly as possible (Tr. 2874). Coors beer which reaches the age of 90 days is considered old, and must be destroyed by the distributor (Tr. 1369).

Refrigerating marketing requires that the beer is rotated at the retail level so that the consumer purchases Coors beer in the finest possible condition (RX 1047F, para. 10). "Rotation" means that the first beer in is the first beer out, and is the only procedure assuring that the beer is fresh at the retail level. Because retailers cannot be depended upon to provide this rotation, Coors, therefore, places this responsibility on its distributors who must also ascertain that each retail account has only enough beer on inventory to last until the next delivery date (Tr. 1088; RX 1047F, para. 10).

The Coors distributor is responsible for obtaining proper market penetration by actively soliciting business from *every* retailer within the established trade area (RX 1047 F, para. 9). Expert testimony confirmed that competition in the beer industry is based upon market penetration – market share (Tr. 2199-2200).

In 1970, Coors' market share in its marketing area was 27.83 percent; total beer consumption in 1970 in that area was 26,147,538 barrels, of which Coors sold 7,277,076 barrels (RX 1173J, K).

Coors beer is marketed through 166 independent distributors and one wholly owned subsidiary company serving as a model and a research laboratory to give Coors distributorship experience (Tr. 2860, 2862; RX 170, pp. 7-8). No one has ever paid Coors to become a Coors distributor (Tr. 1362, 1895, 1547, 1911, 1392); many of its distributorships are family operations handed down from one generation to the next. Coors has considered distributing its beer, but would do so only as a last resort and only if it were forced to. Its distributors are aware of this fact (Tr. 2905-2906).

Coors' unique and delicate product accordingly requires vertical assignment of exclusive marketing territories to its distributors. Only by so assigning complete distribution responsibility in a marketing area can Coors guarantee successful

monitoring of its quality control program (Tr. 708-709; 2202, 2204, 2206-2208; 2879-2880, 2891). Multiple Coors' distributors competing with each other in the same market would force a battle for the high volume accounts; consequently the small retail accounts, the backbone of Coors' marketing survival, would be sacrificed (Tr. 2891). Chaos would result (Tr. 2206, 2510). Without such assignment of exclusive territories to its distributors, Coors could not attract and keep competent distributors for its products (see note 2 *infra*; e.g. Tr. 447, 1864, 1923M; App. C at 174). Destruction of the Coors' vertically assigned exclusive marketing territories will thus destroy effective use of the Coors' quality control program, threaten the very market penetration which is required for Coors to survive in the industry, and prevent Coors from engaging competent distributors for its products.

REASONS FOR GRANTING THE WRIT

I

VERTICALLY IMPOSED EXCLUSIVE MARKETING TERRITORIES ARE OR SHOULD BE SUBJECT TO THE RULE OF REASON UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE ANTITRUST LAWS, AND THE COURT BELOW SUBJECTED SUCH TERRITORIAL RESTRICTIONS TO A *PER SE* RULE IN CONFLICT WITH THE DECISION OF THIS COURT IN *UNITED STATES V. ARNOLD, SCHWINN & CO.* AND WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL.

The distribution contracts between the Adolph Coors Company and its independent distributors provide, in relevant part, as follows:

> While this agreement is in effect the Distributor will conduct the business of wholesale distribution of Coors beer in the above territory only . . . . (CX351B, CX352B)[2]

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[2]Distributors of Coors called to testify at the Hearing below unanimously stated they would not have made the investment they made in their distributorships if Coors did not have the policy of only one distributor in a given marketing territory (e.g., Tr. 447; 1864; 1923M). The territorial clause in the Coors' distribution contracts has been in use for many years prior to the *White Motor* and *Schwinn* decisions, *infra*.

After a full trial, the Administrative Law Judge held that such vertical territorial restraint was lawful under Section 5 of the Federal Trade Commission Act:

> The territorial restrictions used by Coors are essential to obtain the market penetration and quality control standard required for Coors to maintain its hard-won competitive position and to stay in the highly competitive brewing and beer distribution industry. Further, such restrictions are required for Coors to obtain competent distributors for its beer. Not only are the Coors distribution practices and procedures involving territorial restrictions upon resale of Coors beer necessary, they are procompetitive from the standpoint of inter-brand competition in the sale of beer. The dominion and control which Coors exercises over its beer, to protect the value of its trademark and the quality of its product, requires the imposition of the territorial restriction contained in its distributor contracts. This dominion and control results in a reduced risk of loss to the Adolph Coors Company. App. C, at 173-174.

Vertically imposed exclusive marketing territories assigned by a manufacturer to its wholesale distributors were presumed valid almost from the inception of the antitrust laws, as confirmed by this Court's decision in *White Motor Company v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed. 2d 738 (1963). Not until this Court's opinion in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed. 2d 1249 (1967) did such territorial restraints come under question. This Court in *United States v. Arnold, Schwinn and Company, supra*, premised that decision on the rule of reason, stated therein as follows:

> In *White Motor Company v. United States*, 372 U.S. 253, 9 L.Ed. 2d 738, 83 S.Ct. 696 (1963), this Court refused to affirm summary judgment against the manufacturer even though there were not only vertical restrictions as to territory and customer selection but also unlawful price fixing. The Court held that there was no showing that the price fixing was "an integral part of the whole distribution system", and accordingly it declined to outlaw the system because of the possibility that a trial laying bare "the economic and business stuff out of which these arrangements emerge" might demonstrate their reason-

> ableness . . . . [S]o here we must look to the specifics of the challenged practices and their impact upon the market place in order to make a judgment as to whether the restraint is or is not "reasonable" in the special sense in which section 1 of the Sherman Act must be read for purposes of this inquiry. 388 U.S. at 373.

Later in the opinion, however, Justice Fortas writing for the Court commented that where a manufacturer sells products to its distributors subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results. 388 U.S. at 379.

Other portions of the opinion, however, again indicate that the case is based upon the rule of reason. For example, Justice Fortas stated:

> We first observe that the facts of this case do not come within the specific illustrations which the Court in *White Motor* articulated as possible factors relevant to a showing that the challenged vertical restraint is sheltered by the rule of reason because it is not anti-competitive. *Schwinn* was not a newcomer, seeking to break into or to stay in the bicycle business. 388 U.S. at 374.

Furthermore, Justice Fortas conditioned any *per se* application of the Schwinn rule to those situations:

> . . . [W]here the manufacturer parts with title, dominion, or risk with respect to the article . . . . 388 U.S. at 379.

United States Courts of Appeal considering the issue whether vertical territorial restraints are *per se* violations of section 1 of the Sherman Act under that *Schwinn* decision, have held, directly contrary to the Court of Appeals below, that such decision is not an absolute *per se* rule against all vertically imposed territorial restraints. In *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398 (2nd Cir. 1968), *cert. denied*, 393 U.S. 938, 89 S.Ct. 303, 21 L.Ed. 2d 275 (1968), the Court of Appeals for the Second Circuit emphasized that the *Schwinn* decision of this Court was predicated on an enforcement of the restrictions involved in a "firm and resolute" manner absent which no *per se* violation could be found. See also in this connection *Colorado Pump and Supply Company v. Febco, Inc.*, 472 F.2d 637 (10th Cir. 1973), *cert. denied*, 411 U.S. 987, 93 S.Ct. 2274, 36 L.Ed. 2d 965 (1973). In *Tripoli Company, Inc. v. Wella Corp.*, 425 F.2d 932 (3rd Cir. 1970), *cert denied*, 400

U.S. 831, 91 S.Ct. 62, 27 L.Ed. 2d 62 (1970), the Court of Appeals for the Third Circuit held that:

> It is clear that not all restraints in a system of distribution fall into the per se category. *United States v. Arnold Schwinn and Company, supra; White Motor Company v. United States,* 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed. 2d 738 (1963). Those condemned in *Schwinn* as *per se* violations were post-sale restrictions on the territory in which or the retailers to whom a wholesaler could resell. That case does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, *Schwinn,* must be read, as must all anti-trust cases, in its factual context. The context is a restraint on the territories in which and retailer to whom a wholesale purchaser may resell a bicycle, a product so simple in use that most ultimate consumers are children. No considerations other than marketing and competition were advanced in *Schwinn* as justifications for restraint. 425 F.2d at 936.

See also *Carter-Wallace, Inc. v. United States,* 449 F.2d 1374 (Ct. Cl. 1971), where that Court similarly emphasized the nature of the product in rejecting the *per se* view of *Schwinn.* And in the case of *Anderson v. American Automobile Association,* 454 F.2d 1240 (9th Cir. 1972), the Court of Appeals for the Ninth Circuit, after reviewing towing service contracts between the AAA and a number of towing services assigning exclusive territories within which the services were permitted to operate on a take-it or leave-it basis, held that:

> We view the restrictive arrangements as solely the product of vertical agreements between the associations and the individual contract stations as to which the rule of reason is applicable [citing to *White Motor Company v. United States,* 372 U.S. 253, 9 L.Ed. 2d 738, 83 S.Ct. 696 (1963)]. 454 F.2d at 1244.
>
> * * *
>
> The contractual arrangement is not *per se* or *prima facia* illegal [citing *Schwinn,* 388 U.S. at 375]. 454 F.2d at 1246.

Furthermore, in *Norman M. Morris Corporation v. Weinstein,* 466 F.2d 137 (5th Cir. 1972), the Court of Appeals for the Fifth Circuit held that a manufacturer has a right to select a

distributor who shall exclusively represent him in the sale of his product and to designate the exclusive territory within which he shall so act.

Equally obvious and compelling authority showing that the *Schwinn* decision of this Court does not impose an absolute *per se* rule is found in actions of the Federal Trade Commission. In its report of Ad Hoc Committee on Franchising, 1969, (RX 1080) the Commission stated:

> It appears that in *Schwinn*, the Court left enough leeway in its initial threshhold test of the overall reasonableness of vertical arrangements to enable a manufacturer to justify such an arrangement by establishing that it could not have entered the market or expanded its market share because of the impossibility of obtaining dealers willing to handle its products without some territorial protection, and by showing its inability to finance an effective agency-consignment arrangement. (RX 1080, p. 30).[3]

Subsequently, in 1970, the very Administrative Law Judge who heard the instant Coors case held, in *In Re Universal Electronics Corporation, Inc., and Wendell Coker*, 78 F.T.C. 269 (1970), that a manufacturer was required under the Federal Trade Commission to grant, in writing, the vertical, exclusive marketing territory he had promised, and further, that the manufacturer must enforce and abide by such exclusive territorial

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[3]On the Federal level and in ten of the eleven states in which it markets its beer, the Adolph Coors Company is prohibited by law from using the consignment method of distribution: 27 U.S.C.A. §205(d) and (f); Ariz. Rev. Stat. Ann. §4-243 (1967) and §4-242 (1963); West's Ann. Cal. Bus. & Prof. Code §§25500 (1965), 25501 (1968), 25502 (1969) and 25503 (1957); Colo. Rev. Stat. Ann. 1963, §§75-1-8, 75-2-15 (1) (a), (b) (1969 Supp.); Idaho Code §§23-911 (1973), 23-912 (1968); 23-1033 (1972) and 23-1031 (1968); Kan. Stat. Ann. §§41-704 and 41-702 (1964); N.M. Stat. Ann. §§46-10-18 and 46-9-8 (c) (1953); Okla. Stat. Ann. 37 §534 and 37 §535 (5) (1959); Okla. Al. Bev. Control Bd., Rules and Regulations, Art. 3, Sec. 11, Sec. 12; Tex. Penal Code, Arts. 666-3 (a) (2), 666-53, 667-24 (1952); Utah Liq. Cont. Comm. Reg. 7; Wyo. Stat. Ann. §§12-9 (c) (1973), 12-23 (1973) and 12-24 (a) (1967). The distinction between a sale and a consignment should not, in any event, become the determining factor in such an important question of antitrust law. *Schwinn, supra.*, 388 U.S. at 389 (Justice Stewert's dissent); and see Keck, *Alternative Distribution Techniques – Franchising, Consignment, Agency and Licensing*, 13 Antitrust Bull. 177, 186 (1968).

grant. The Federal Trade Commissioners adopted and enforced that decision and order. 78 F.T.C. 297 (1971), reh. denied, 78 F.T.C. 1576 (1971).

Finally the Commission recently determined that in the future only the rule of reason, and not a *per se* approach, will be used by it in its identical proceedings against territorial restrictions in the soft drink industry. This was made clear in a prepared statement of Mr. James T. Halverson, Director, Bureau of Competition, Federal Trade Commission, before the Subcommittee on Commerce and Finance, Committee on Interstate and Foreign Commerce, House of Representatives, on June 27, 1974, in opposition to enactment of S. 978, H.R. 122, and H.R. 10014 (Senate and House Bills authorizing territorial restrictions on the resale of trademarked food products and soft drinks). Mr. Halverson stated therein as follows (Appendix E. at 3-4, herein; this prepared statement of Mr. Halverson is not yet officially reported):

> One of the principal considerations which was advanced by the industry in justification of this legislation was the argument that the Commission's soft drink cases were being presented on a *per se* theory of unlawfulness. More particularly, it was argued that the effect of proceedings under this theory was to preclude the respondents in these cases from presenting any defenses based upon alleged procompetitive effects of the territorial restrictions and from offering any legitimate countervailing business justifications therefor. . . .
>
> The types of agreements which are under challenge have been in effect in some instances for over three-quarters of a century and, over the years, have been considered by some to be economically desirable and lawful. In this historical context, the view that anything less than an examination of the full range of relevant factors relating to both conduct and remedy might possibly give rise to an unjust result cannot be rejected out of hand. This position is not devoid of merit.
>
> The most important point that I should leave you with is that the Bureau of Competition is no longer proceeding on the *per se* theory of unlawfulness which the industry has found so objectionable. Our new trial team has elected to revise both theory and evidentiary presentation and to try these cases on a "rule of reason" basis. This means that the

> respondents will be able to present by way of defense, within recognized judicial limits, evidence of procompetitive effects or business justification for the challenged agreements which they deem appropriate . . . .
>
> All of that has changed. And it is these changed circumstances which form our most important basis for objecting to the proposed legislation.
>
> * * *

The conclusion reached by the Administrative Law Judge is correct. If it can be shown that vertical territorial restrictions are a competitive necessity for a manufacturer to survive and stay in the industry, and if such vertical territorial restrictions are procompetitive from the interbrand standpoint, then such restrictions are permissible under the Federal Trade Commission Act and the antitrust laws, and under the decision of this Court in *Schwinn, supra.*

If, however, this Court should conclude that the *Schwinn* decision constitutes an absolute *per se* rule outlawing any and all vertical territorial restraints in the resale of products, then we submit, as did the Court of Appeals below, that this decision must be reviewed to determine whether this Court may see the wisdom of grafting an exception to the *per se* rule. As the Court below stated, (App. A, at 14);

> Although we are compelled to follow the *Schwinn per se* rule rendering Coors' territorial restrictions on resale illegal *per se*, we believe that the *per se* rule should yield to situations where a unique product requires territorial restrictions to remain in business. For example, speed of delivery, quality control of the product, refrigerated delivery, and condition of the Coors product at the time of delivery may justify restraints on trade that would be unreasonable when applied to marketing standardized products. *LaFortune v. Ebie, supra.* Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason. *White Motor Co. v. United States,* 372 U.S. 253 (1963).

The request of the Court below that this Court graft an exception to what it held was the *per se* rule of *Schwinn* is truly an illustration of the growing concern about the impact of the *Schwinn* decision. Commentators are critical of that *Schwinn*

decision on a number of grounds: that the restraint-on-alienation rationale of the *Schwinn* decision is clearly an inappropriate ground for the decision under the antitrust laws,[4] and that such rationale is plainly erroneous;[5] that vertically imposed territorial restraints are not so frequently destructive of competition that they warrant a *per se* prohibition, and that the rule of reason should instead be used to test the legality of same because such restraints frequently are necessary for the preservation of competition;[6] and that *Schwinn* is impelling vertical integration. As a recent comment aptly stated:[7]

> First of all, the *Schwinn per se* rule has had, contrary to the purpose expressed in *Schwinn*, an unfortunate effect on small and medium sized businesses. The Schwinn Company itself was forced into vertical integration of its distribution system, as was Sealy. Other companies may be required to take similar action, but they hope to avoid the necessity of adopting a distribution system which they cannot afford.

And if this Court does review the *Schwinn* decision as an absolute *per se* rule case, then this Court must grant certiorari to resolve a direct conflict of this case with decisions of the United States Court of Appeals for the Second Circuit, the Third Circuit, the Fifth Circuit, and the Ninth Circuit, cited *supra*, decided subsequent to the *Schwinn* decision. Further, this decision of the Tenth Circuit is in conflict with the decisions in *Snap-On Tools Corp. v. F.T.C.*, 321 F.2d 825 (7th Cir. 1963) and *Sandura Company v. F.T.C.*, 339 F.2d 847 (6th Cir. 1964) decided prior to the *Schwinn* case.

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[4]Pollock, *Distribution In the Wake of Schwinn, White Motor, et. al.*, 23 Record 241, 245 (1968).

[5]*Effect of Schwinn Bike on Territorial and Customer Restraints and Consignments: Will It Force Manufacturers Into Forward Integration?*, 2 Conn. L. Rev. 383, 393-394 (1970).

[6]See generally, Warren, *Economics of Closed-Territory Distribution*, 2 Antitrust L. Econ. Rev. 111 (1968-1969).

[7]*Vertical Territorial and Customer Restrictions Under the Sherman Act: Decisions Since United States v. Arnold, Schwinn & Co.*, 22 J. Pub. L. 483, 497-498 (Emory University 1973). See Panel Discussion, 37 Antitrust L. J. 184, 185 (1968); and see Kittelle, *Territorial and Customer Restrictions Through Consignment or Agency, – Schwinn or Sin?*, 12 Antitrust Bull. 1007-1008 (1967).

II

THE COURT BELOW APPLIED THE SUBSTANTIAL EVIDENCE TEST TO PERMIT ITS REVIEW OF ONLY THE EVIDENCE WHICH MIGHT SUPPORT THE FEDERAL TRADE COMMISSION OPINION AND ORDER, AND NOT EVIDENCE FAIRLY DETRACTING FROM THAT OPINION AND ORDER, IN CONFLICT WITH THE DECISION OF THIS COURT IN *UNIVERSAL CAMERA CORP. V. N.L.R.B.* AND A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The fact issues subject to review in this matter by the court below (apart from the questions pertaining to the rule of reason and Coors' vertically imposed territorial restraints) under the substantial evidence test were:

1. whether the Adolph Coors Company fixed and controlled the prices at which its distributors and retailers sell Coors beer;

2. whether the Adolph Coors Company required its distributors to require that their retailers serve Coors draught beer exclusively, or not at all;

3. whether the Adolph Coors Company unlawfully prohibited its distributors from selling and delivering beer to central warehouse accounts;

4. whether the Adolph Coors Company used a threat of speedy termination to force its distributors into anti-competitive behavior.

The Court below merely considered on each of these points whether there was any substantial evidence to support the order of the Commissioners that Coors did engage in the conduct alleged. See that Court's determination on price fixing (App. A., at 10, 12); on exclusive draught accounts (App. A, at 15); on central warehousing (App. A., at 16), even though as a matter of law no customer restriction could be involved here, since *every* "central warehouse" account was being serviced by existing Coors distributors by direct delivery (App. C, at 164); and on threats of termination (App. A., at 17). [8]

[8] Examples of the kind of evidence excluded from the Court's consideration by its improper application of the *Universal Camera* decision of this Court on the price fixing issue are as follows:

This Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), expressly rejected that interpretation of the substantial evidence test, which would permit the reviewing court to determine the substantiality of evidence supporting an agency decision "merely on the basis of evidence which in and of itself justified it . . . ." 340 U.S. at 487. This court there required that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." 340 U.S. at 488. Moreover, this court in *Universal Camera Corp., supra,* clearly stated that credibility issues largely determined the import of the decision of the hearing examiner, now administrative law judge, when this court commented as follows:

> We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial,

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[8](Continued)
that with the exception of Commission Witness Thurman, every witness for the Commission testified that all Coors ever did was to suggest prices, and that the distributor or retailer was free to make his own decision as to prices he would charge (e.g., Tr. 379, 582; App. C at 157);
that Coors' Sales Representatives had told distributors that their prices are their own business (e.g., Tr. 506) and that distributors have declined to follow Coors' price recommendations on numerous occasions (e.g., Tr. 456, 462, 465, 527, 539, 560; App. C at 157-158);
that prices of Coors beer at both the wholesale and retail level in the Coors' marketing area are widely scattered, except in price posting states and states where advertising is prohibited by law (see App. C at 158, 160);
that price variations are notorious and widespread (Tr. 2166, 2167) even in Coors' home state (RX 1148A - 1154D);
that public advertisements of retailers selling Coors beer below cost or Coors' suggestions are constant and widespread in Coors' marketing territory (RX 525-648; RX 650-699; Tr. 2496);
that Coors' Sales Representatives do not threaten distributors or retailers about pricing (e.g., Tr. 1149, 1771);
that Coors beer is regularly sold to some 70,000 retail accounts, and that the Federal Trade Commission sought to introduce the testimony of only two retailers to prove retail price fixing (App. C at 177);
that the only evidence in the entire case of a retailer being denied Coors beer for failure to abide by any suggested pricing, occurred in a dispute between a retailer and a Coors distributor, where the Adolph Coors Company did not even know of the problem until *after* the distributor had refused to sell that retailer Coors beer (Tr. 1852-1853, Tr. 836; CX 2005, CX 2014). The distributor testified that in that

experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the [agency's] than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in a particular case. 340 U.S. at 496.

The credibility of witnesses was a critical issue in this case on the price fixing charge. Two of the four key witnesses relied on by Complaint Counsel and the Commissioners to prove that

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[8](Continued)
instance he acted on his own (Tr. 1852). That retailer thereafter continued to receive Coors beer at another retail outlet serviced by another Coors distributor (Tr. 1831-1832).

The actual record evidence, ignored by the Court below, relevant to its finding that Coors did force its distributors to force retailers to handle Coors draught beer exclusively or not at all, is best illustrated by brief reference to the decision of the Administrative Law Judge summarizing the evidence (App. C at 161-162):

> Almost every witness testified on the subject of split accounts stated that they had no policy against split accounts and in fact accounts were split in their territory (Tr. 413, 561, 609, 729, 1779, 1790, 1849, 1883, 1901, 1987, 2014, 1491). Mr. Ford, Oklahoma City, Oklahoma distributor, testified that the only accounts he didn't service, including draught beer accounts, were draught accounts serviced exclusively by competitors, such as Miller's and Budweiser, and that he serviced 95% of the retail accounts in his marketing area (Tr. 1978). In some instances sales representatives have actually encouraged distributors to take on split accounts (Tr. 2063; CX 287). Evidence of split accounts was so overwhelming that Commission counsel failed to introduce into evidence records subpoenaed by the Commission from various distributors which showed large number of Coors' accounts split with almost all various major brands. Only through insistence by respondent's [Coors'] counsel was this evidence forced into the record (Tr. 1358; RX 1108). Even though accounts do not have draught beer, or are split, they have other packages of Coors beer in those accounts (Tr. 636, 695, 1503).

As to central warehousing and the alleged threats of termination, reference to the decision of the Administrative Law Judge, Appendix C at 163-164, and 164-165, 177, respectively, provides accurate record references showing that the record as a whole does not support the action of the Federal Trade Commissioners. Indeed, as to alleged threats of termination, the record shows and the Law Judge held, *supra*, that there have been only three (3) terminations of distributors by Coors in the last fifteen years.

charges were found not credible by the Administrative Law Judge who heard their testimony. They were Commission witnesses Hemphill, App. C. at 63; and Thurman, App. C at 65. Furthermore, the Administrative Law Judge ruled that the testimony of the third key Commission witness on price fixing, Mr. Wagnon, was thoroughly rebutted by his admissions on his cross-examination, App. C at 17. The Court below in part recognized these facts (App. A., at 8). But the Court below ignored the *Universal Camera* mandate and, continuing its review of only evidence tending to support the Commissioners' decision, held that their action in overruling the Administrative Law Judge's credibility findings must be upheld because it

> . . . is not required to be supported by a very substantial preponderance of the evidence. (App. A., at 9).

The Court also enforced the Commissioners *de novo* reversal of the Law Judge because

> . . . [W]here there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. (App. A., at 9).

and because:

> If the inference [drawn by the Commissioners) is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. (App. A., at 9).

The Court below stated in passing that the Commission must consider the initial decision of the Administrative Law Judge (App. A., at 9). Any application of this statement to the actual facts in the case, however, would have required reversal of the Commission decision. The Commissioners stated point blank in their opinion that they were "substituting" their decision for that of the Administrative Law Judge. Moreover, they did so without citation to any findings and conclusions of the Administrative Law Judge. The Commissioners substituted their decision for that of the Administrative Law Judge because the Judge did not have views "distinguishable from those of [Coors] on any of the major issues in this case" (App. B at 12).

This application of the substantial evidence test by the Court below not only is in direct conflict with this Court's decision in *Universal Camera, supra*, but also is in direct conflict with the decision on this point of the Court of Appeals for the District of Columbia in *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583 (D.C. Cir.

1970). In that case the Court of Appeals for the District of Columbia confronted a situation where, as here, the Federal Trade Commission reversed its hearing examiner by simply ignoring his initial decision and reviewed the evidence in the case *de novo*. That Court held:

> We are unable to find any authority for their [the Federal Trade Commissioners] proposition that a sixteen-day hearing may be completely ignored if the Commissioners are dissatisfied with the result reached by their hearing examiner. 425 F.2d at 587.

The Court of Appeals for the District of Columbia further pointed out in that case:

> There is reason for the procedure set forth in the rules and regulations promulgated under the Federal Trade Commission Act. The procedures which have been established are designed to provide for proceedings in which both the Commission and the responding party have a fair and equal opportunity to present exhibits and witnesses designed to establish the legitimacy of their argument. The regulations are drawn so as to require reliance on that evidence by the hearing examiner [16 C.F.R. §3.51 (b) (1969)]. We think it as preposterous for the Commission to claim a right to ignore that evidence and, with more daring than prudence, to decide a case *de novo* as it would be for this Court to claim a right to ignore the findings of fact and conclusions of law of a district court in a proceeding here, substituting the judgment of this Court on a cold record for that of the finder of fact below. 425 F.2d at 587-588.

In conclusion, that Court pointed out the fundamental error in the *de novo* procedures used by the Federal Trade Commission in that case, the same procedures used by it in the instant case:

> . . .[T]he Commissioners are not free to boil over in aggression and completely dismiss these proceedings either because they are dissatisfied with the outcome, or for any other reason. Such procedure is rooted in nothing and places the Commission in the position of being both the instrument and the musician at the same time. The result, legally, is a ragged and confusing mosaic defying the very archtype of due process, abandoning the merit in hearings of the power of persuasion for the persuasion of power and

thereby producing a self-justifying system that makes fairness not really the controlling factor in practice that it seems in metaphor. 425 F.2d at 588-589.

Action by the court below in sustaining this very *de novo* conduct by the Federal Trade Commissioners nullifies in every sense the hearing had before the Administrative Law Judge. It repudiates the standards and procedures set forth in the Administrative Procedure Act, 5 U.S.C. §§556, 557 and 706(e), and the Federal Trade Commission Act, 15 U.S.C. §45(C), concerning the substantial evidence test, and the Commission's own rules concerning initial decisions of administrative law judges and review thereof by the Commissioners 16 C.F.R. §§3.51(a), (b), (c), and 3.54(a) and (b). It results in the denial of Coors' right to due process of law guaranteed it by the Fifth Amendment to the Constitution of the United States of America.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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279-5561

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 73-1567

ADOLPH COORS COMPANY,	)	
	)	
Petitioner-Appellant,	)	
	)	Petition to Review an
vs.	)	Order of the Federal
	)	Trade Commission
FEDERAL TRADE COMMISSION,	)	
	)	
Respondent-Appellee	)	

Leon N. Bradley, Golden, Colorado (Earl K. Madsen, Golden, Colorado, on the brief) for Appellant.

Robert E. Duncan, Washington, D.C. (Calvin J. Collier, General Counsel; Gerald Harwood, Acting Assistant General Counsel; W. Baldin Ogden, Washington, D.C., on the brief) for Appellee.

Before HOLLOWAY and BARRETT, Circuit Judges, and DURFEE, Judge Court of Claims.*

BARRETT, Circuit Judge.

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* Honorable James R. Durfee, sitting by designation.

Adolph Coors Company appeals an Order to Cease and Desist issued by the Federal Trade Commission. The FTC filed a complaint alleging that Coors was engaged in anticompetitive practices in violation of Section 5 of the Federal Trade Commission Act.[1] An Initial Decision was issued by the Administrative Law Judge after hearings were conducted in Denver extending over a period of thirty days. The Law Judge found that Coors had not violated the Act. He recommended that the complaint be dismissed. The FTC appealed the Initial Decision to the five-member Federal Trade Commission. The Commission substituted its findings for those of the Law Judge and found, as a matter of law, that Coors had violated Section 5 of the Act.[2]

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[1]Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. §45, provides in part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, ... from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[2]The Commissioners ordered that Coors cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, maintaining, establishing or setting of the prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers.

2. Publishing, disseminating or providing any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any distributor to any retailer or any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any retailer to any consumer.* * *

3. Publishing, disseminating or providing to any distributor or any retailer any information or suggestions concerning what Coors may believe to be an appropriate or proper mark-up or profit for Coors beer when the distributor sells to the retailer or when the retailer sells to the

Adolph Coors Company, a Colorado corporation, is engaged in brewing, distribution and sale of beer, using the trade name of "Coors". Coors has one brewery in Golden, Colorado, and distributes its beer in an eleven-state area. The beer is sold to the distributors who in turn sell to retailers. While Coors is the fourth largest beer brewer in the United States, it alone among the nations some 70 brewers is a "shipping" brewery, i.e., Coors ships all of the beer brewed at its single "regional" brewing plant at Golden, Colorado, F.O.B. to the various distributors in Arizona, California, Colorado, Idaho, Kansas, Nevada, New Mexico, Oklahoma, Texas (some counties only), Utah and Wyoming. In 1971 the average barrel of Coors beer traveled 961 miles to its market place.

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[2](Continued)
consumer or a mark-up or profit below which the distributor or retailer is advised not to sell Coors beer. * * *

4. Refusing to sell beer to any Coors distributor or terminating or threatening to terminate any Coors distributor because:

A. the distributor has in the past or might in the future sell Coors beer at prices, mark-ups, or profits different from those approved or recommended by respondent;

B. one or more of the distributor's customers sold Coors beer or advertised Coors beer for sale at prices, mark-ups, or profits different from those approved or recommended by respondent;

C. the Coors distributor sold Coors beer to another distributor or to a retailer whose business is located outside of the territory granted to the distributor; or

D. the Coors distributor distributes, has distributed, or proposes to distribute in the future the product of another brewer.

5. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct to fix, establish, limit or restrict the territory in which or the persons to whom a distributor may sell Coors beer. * * *

6. Allocating Coors beer among its distributors in times of beer shortage at the Coors brewery, by any means other than by

The beer is made by the aseptic brewing process which requires refrigerated marketing. It is uncontroverted that Coors beer is substantially more expensive than any other beer consumed in the United States, and yet because of its popularity, Coors has climbed from the 49th largest brewery in 1948 to its number 4 position today. Coors maintains market leadership in total sales against all competitors except in its territory served in Texas. Because of the delicacy of the product, it is essential that the refrigeration controls and expeditious marketing techniques be strictly monitored. Once the beer is delivered to the distributors, this obligation is assumed by them under an agreement with Coors. It is the distributor who is required to protect the "integrity" of the Coors beer quality by guarding against a retailer's failure to rotate the beer, and failure to insure proper refrigerated storage. Coors beer retained over 90 days must be destroyed.

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[2](Continued)
allocating shares to distributors equal to their proportionate purchases of Coors beer from the brewery during the last three months before the allocation or when the distributor has not been in business for more than a year as a Coors distributor, on some other equitable basis.

7. Refusing to deliver all of a distributor's order because the distributor has made sales to customers outside of the territory granted the distributor or because the distributor or the distributor's customer is selling Coors beer at prices, mark-ups or profits lower than those approved by respondent.

8. Prohibiting its distributors from selling for central warehouse delivery; provided, however, that respondent can establish refrigeration standards for the central warehouse which are substantially similar to those established for distributors and can require its distributors to be responsible, directly or indirectly, for maintenance of such refrigeration standards and for rotation of Coors beer in the central warehouse and at the retail delivery locations where the beer is redelivered from the central warehouse, if respondent changes its container dating system so that the retailer and the consumer will recognize the date without reference to a code or measuring stick.

9. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct with its

Coors has 35 area representatives to help market the product. Each representative is assigned certain distributors to work with and to see that Coors' Policy Manual is followed. The price Coors charges to its distributors is set by Coors. Coors suggests to its distributors and retailers the price at which to sell beer.

Each distributor is assigned a territory in which to market Coors' products. Coors may reduce the territory or add distributors to a particular territory. There are 166 independent distributors and one wholly owned subsidiary company.

In 1964 Coors eliminated sales to central warehouse accounts. Central warehouse accounts are either retailers such

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[2](Continued)
distributors which has as its purpose or effect requiring that retailers serve Coors draught beer as their only light-colored draught beer.

10. Entering into, maintaining, or enforcing any contract, agreement or understanding, or taking any action or course of conduct with any of its distributors which has as its purpose or effect the requirement that the distributor eliminate, or refrain from obtaining and handling rival brands of beer in order to become or remain a Coors distributor.

11. Hindering, suppressing or eliminating competition or attempting to hinder, suppress or eliminate competition between or among distributors or between or among retailers handling Coors beer.

12. Cancelling any distributor agreement unless and until the respondent has pursued the following procedure:

A. Cancellation With Cause

(a) Respondent has given the distributor sixty days' notice of respondent's intention to cancel its agreement with the distributor; . . . .

B. Cancellation Without Cause

(a) Respondent has given the distributor one hundred and eighty days' notice of respondent's intention to cancel its agreement with the distributor; . . . .

as large chain supermarkets who buy for redelivery to their own outlets, or independents who purchase for redelivery to non-affiliated retail outlets or retailer warehouses.

Coors favors draught accounts. It has a draught policy in which tavern owners are given 30 days to discontinue handling other brands of light draught beer. If the owner-retailer continues to sell another brand of light draught beer, Coors discontinues its supply of light draught beer to the tavern.

The contract between Coors and the distributors enables Coors to cancel its contract for any breach by the distributor, with a five-day notice. Either Coors or the distributor may cancel the contract without cause with a 30-day notice.

Coors contends that: (1) it did not engage in wholesale or retail price fixing; (2) its vertically imposed territories are reasonable and legal; (3) it has no policy of requiring exclusive draught accounts; (4) it has the right to protect its quality product and not distribute its beer through central warehousing; (5) its contract termination rights are reasonable and legal; (6) the provisions of the Commission's Order are not supported by substantial evidence, are not reasonable, and are in conflict with important public policies; (7) the FTC internal procedures have prejudiced its right to a fair hearing; and (8) this court must exercise its power and set aside the Commissioner's Order.

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[2](Continued)

3. IT IS FURTHER ORDERED that respondent, within three (3) months from the date this Order becomes final, shall provide for arbitration, in the city in which a distributor resides, by an independent and neutral arbitrator, to determine in the case of any announced termination, and upon the request of a distributor, whether or not said termination is made in good faith (in the case of termination without cause) or whether or not said termination is made in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise (in the case of termination with cause). * * * *

/s/ Charles A. Tobin
Secretary

ISSUED: July 24, 1973

I.

Coors contends that it did not engage in price fixing agreements with its distributors. Its practices are set out in the Coors Policy Manual which states as follows:

> In order to maintain a successful wholesale business or retail business, pricing integrity is essential. Pricing integrity will result in an adequate and equitable profit to both Distributor and retailer and is fair to the ultimate consumer.
>
> It is the policy of the Adolph Coors Company to suggest, if it so chooses, to either the wholesaler or retailer level, suggested minimum pricing. We reserve the right to further that policy by simply refusing to deal with anyone who doesn't adhere to said policy.
>
> The Adolph Coors Company and its agents must only state the policy. They cannot make agreements, threaten, coerce, or intimidate wholesalers or retailers in any manner. They can enforce the policy only by reserving the right to refuse to deal with those who don't adhere to the suggested prices.

Coors' sales manager, Harvey Gorman, testified that the product is controlled by agreeing individually with each distributor. This policy is enforced by a provision in the contract between Coors and the distributor enabling Coors to terminate a distributorship in 30 days without cause. Since there are about 7,000 applicants for distributorships, any distributor who does not conform to Coors' pricing policies could readily be replaced. Coors' area representatives constantly obtain wholesale price information and send the information to the home office in Golden. The area representatives also resolve any conflicts between the prices proposed by a distributor and those suggested by Coors.

John Hemphill, a former Coors distributor, testified that he would only go so far in making a request to use his own prices, knowing that Coors could terminate him in 30 days.

He also testified that a Coors' representative told him that the best thing for him to do is not to be a distributor if he could not agree to Coors' policies on pricing and territories. The Law Judge had questioned Hemphill's credibility because of a suit pending against Coors, but the Commissioners rejected this fact as bearing on the issue of credibility.

Jay Wagnon, a Coors' distributor, testified that Coors insisted on controlling distributor price increases and that when he refused to adopt wholesale prices suggested by the Coors' area representative he was summoned to Golden and requested to change his prices. He stated that Coors' personnel told him to bring his prices in line with Coors' recommendations or they could put another distributor in his area. He testified that he was afraid; that he had been threatened; and that he therefore conformed to the suggested prices. The Law Judge did not find Wagnon's testimony credible. The Commissioners, on the other hand, found that his testimony was credible.

Jay Thurman, a former distributor, testified that he was given price sheets by the area representative which were to be followed. He was told that if the prices were changed, it would go through Mr. Straight, a Coors official, who, in turn, would determine if the changes were justified.

Peter Tinetti, a former distributor, testified that Coors sent him the prices at which to sell Coors beer.

The area representatives submitted reports to the Golden headquarters about agreements or understandings they had made with distributors on wholesale prices.

Price fixing is illegal *per se* under the Sherman Anti-trust Act. 15 U.S.C.A. §1; Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5 (1958); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 218 (1940). Price fixing is also illegal *per se* under Section 5 of the Federal Trade Commission Act. 15 U.S.C.A. §45. Prices are fixed when they are agreed upon. United States v. Masonite Corporation, 316 U.S. 265, 276 (1942). The agreement to fix prices renders the

conspiracy illegal. The agreement may be inferred or implied from the acts and conduct of the parties, as well as from surrounding circumstances. Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F.Supp. 945 (S.D. Tex. 1972); National Macaroni Manufacturers Association v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965).

> . . . . the test . . . . is whether the agreement, or conduct, interferes with the freedom of sellers or traders in such a manner as to prohibit or restrain their ability to sell in accordance with their own judgment, and not what particular effect the agreement or conduct, has on the actual prices.
>
> 339 F.Supp. 945 at 952

The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105 (1942); *National Macaroni, supra.* If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni, supra.*

The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583 (D.C. Cir. 1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. OKC Corp. v. Federal Trade Commission, 455 F.2d 1159

(10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra.*

There is substantial evidence from the record as a whole to support the Commission's findings of price fixing agreements between Coors and its distributors.

Coors also challenges the Commission's findings that Coors has a resale price maintenance program and that it has in some cases secured adherence to its suggested retail prices by unlawful means. There is substantial evidence to support the Commission's finding.

Coors' policy is to establish pricing integrity which means that a certain profit is allowed on each level of resale. Price integrity is not possible with price discounting. Coors implements pricing integrity by refusing to deal with anyone not adhering to its price suggestions. A Coors' area representative threatened to refuse further sales to an offending retailer unless he would adhere to the prices suggested by Coors. Coors used its distributors to secure retailers' adherence to suggested minimum prices. One area representative reported that a retailer was cut off by a distributor because the retailer was advertising Coors beer at cut prices. Another area representative reported that a distributor planned to take appropriate action against a retailer who refused to sell at suggested prices. A distributor reported that Coors beer was not delivered to a retailer who cut prices. An area representative reported that action would be taken against a retailer who refused to raise his prices to a profit level.

Mr. Letcher, a retailer, testified that he was selling Coors at special weekend prices and that he was warned by the Coors distributor to discontinue the practice. Letcher refused to cooperate and the distributor terminated deliveries to his store. The distributor told Letcher that deliveries would be

received if he would agree not to discount the beer, and that Letcher might lose the retail account if he continued to discount the beer. Letcher was also told by the distributor that Coors does not tolerate price cutting. Letcher sold his business. The distributor resumed deliveries to the new owners who agreed not to discount the beer. The distributor did not act independently in cutting off Letcher as Coors suggests, but cut him off in accordance with Coors' pricing policies.

United States Supreme Court decisions hold that if a manufacturer advances beyond a simple refusal to deal and takes affirmative action to secure compliance with its prices, a combination in violation of Section 1 of the Sherman Antitrust Act and Section 5 of the Federal Trade Commission Act occurs. United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Federal Trade Commission v. Beech-Nut Packing Company, 257 U.S. 441 (1922). Any trespass on the independence of a reseller or wholesaler to set his own prices is a violation of the Sherman Act. *Pearl Brewing Co., supra.* A seller may refuse to deal with one failing to adhere to its specified prices, United States v. Colgate & Company, 250 U.S. 300 (1919), but where a concerned effort is used to interfere with the distributors' pricing independence and to compel them to adhere to suggested prices, there is a violation of the Sherman Antitrust Act. A manufacturer may choose those to whom it will sell to as long as its conduct has no monopolistic purposes. Colorado Pump & Supply Company v. Febco, Incorporated, 472 F2d 637 (10th Cir. 1973), cert. denied 411 U.S. 987 (1973).

The Commission found that:

> . . . . [Coors] has pursued a policy of fixing, controlling and maintaining prices at which Coors beer is sold at both the wholesale and retail level, that in furtherance of this policy it has engaged in various acts and practices such as: suggested resale prices to both distributors and retailers, checking prices at which distributors and retailers sell Coors beer, advising distributors and retailers that it is contrary to Coors pricing policy for them to deviate from prices approved by respondent, threatening

> to terminate distributorships and threatening to force distributors to sell their businesses for refusing to adhere to suggested retail prices, entering into agreements and understandings with distributors as to the wholesale prices which the distributors will charge for Coors beer, joining with distributors in attempting to coerce retailers to refrain from selling Coors beer at prices below those approved by respondent, encouraging distributors to prevent retail price cutting by refusing to deliver Coors beer to price cutters. or to reduce the amount of beer delivered, and entering into agreements and understandings with retailers as to the retail prices or range of prices at which such retailers will sell Coors beer.

There is substantial evidence in the record to support the Commission's findings.

II.

Coors alleges that its vertically imposed territories are reasonable and legal. The Commission held that Coors vigorously enforces its territorial restrictions and that it has engaged in unlawful price fixing which is:

> . . . . [s]trong grounds for presuming that the most injurious effects of vertical territorial divisions may be operative, and, therefore, for holding the entire arrangement of territories with price fixing illegal per se.

The Coors' distributor contract provides, in part, as follows:

> While this agreement is in effect the Distributor will conduct the business of wholesale distribution of Coors Beer in the above territory only . . . .

In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the United States brought an antitrust action against Arnold, Schwinn & Co., an association of Schwinn distributors and a Schwinn distributor, seeking a declaratory judgment to invalidate the distribution franchising system of

its products. Schwinn bicycles are shipped directly to franchised retailers who agree to sell only to ultimate consumers. Schwinn also distributed its bicycles to franchised distributors who agreed not to resell to anyone outside their assigned territories. The Court held that:

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor,* [Co. v. United States, 372 U.S. 253 (1963)]; Dr. Miles [Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911)]. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.
>
> 388 U.S. at 379.

The rule of law in *Schwinn* is clear and unequivocal.

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred – whether by explicit agreement or by silent combination or understanding with his vendee – is a *per se* violation of § 1 of the Sherman Act.
>
> 388 U.S. at 382.

See Federal Trade Commission v. Sperry & Hutchinson Co., 405 U.S. 233, 247 (1972); United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Williams v. Independent News Co., Inc., 485 F.2d 1099 (3rd Cir. 1973); Warriner Hermetics, Inc. v. Copeland Refrigeration Corporation, 463 F.2d 1002 (5th Cir. 1972), cert. denied 409 U.S. 1086 (1972); Beverage Distributors, Inc. v. Olympia Brewing Co., 440 F.2d 21 (9th Cir. 1971), cert. denied 403 U.S. 906 (1971); Fontana

Aviation, Inc. v. Beech Aircraft Corporation, 432 F.2d 1080 (7th Cir. 1970), cert. denied 401 U.S. 923 (1971). *Cf.* Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. Claims 1971); Tripoli Company v. Wella Corporation, 425 F.2d 932 (3rd Cir. 1970), cert. denied 400 U.S. 831 (1970); LaFortune v. Ebie, 26 Cal.App.3d 72, 102 Cal. Rptr. 588 (Cal.Ct.App. 1972).

Coors, a manufacturer, enters into an agreement with its distributors to distribute Coors beer in the assigned territory only. Coors maintains that the territorial restrictions are necessary to retain the quality and proper refrigerated handling of its beer, and that the territorial restrictions are legal. However, since Coors parts with title and risk to the product when it sells and delivers the beer to distributors, and thus has parted with dominion over the product, its further effort to restrict the territories or persons to whom the product can be transferred is a *per se* violation of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Coors may still condition its sales to distributors and others upon maintenance of procedures necessary to control the quality of the product.

Although we are compelled to follow the *Schwinn per se* rule rendering Coors' territorial restrictions on resale illegal *per se*, we believe that the *per se* rule should yield to situations where a unique product requires territorial restrictions to remain in business. For example, speed of delivery, quality control of the product, refrigerated delivery, and condition of the Coors product at the time of delivery may justify restraints on trade that would be unreasonable when applied to marketing standardized products. La Fortune v. Ebie, *supra*. Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason. White Motor Co. v. United States, 372 U.S. 253 (1963).

The dissenters in *Schwinn* contended that the new *per se* rule cannot be justified, automatically invalidating vertical restraints in a distribution system based on sales to wholesalers and retailers.

> . . . . the court has, *sua sponte*, created a bluntly indiscriminate and destructive weapon which can be used to dismantle a vast variety of distributional systems -- competitive and anticompetitive, reasonable and unreasonable.
>
> 388 U.S. at 394.

Thus we are foreclosed from considering the reasonableness of the restriction or its business justification. We are cognizant of the unpredictability which is created in relationship to the Coors operation.

III.

Coors contends that it has no policy of requiring exclusive draught accounts. The Commission found that Coors combined with its distributors in the practice of encouraging and coercing retailers to sell Coors draught beer to the exclusion of light draught beer competitors in violation of Section 5 of the Federal Trade Commission Act.

Mr. Coors testified that exclusive draught accounts were desirable. Several distributors testified that the purpose of obtaining exclusive draught accounts is to encourage draught customers to buy beer to take home. To implement the policy, Coors threatened to terminate a retailer's supply of Coors draught beer unless he eliminated competitive draught beers within 30 days. Coors' distributors did, in fact, take out their Coors draught beer if the retailer did not comply with the policy.

Agreements foreclosing a competitor's products are unlawful. Federal Trade Commission v. Brown Shoe Co., Inc., 384 U.S. 316 (1966); Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941); Standard Fashion Company v. Magrane-Houston Company, 258 U.S. 346 (1922). The policy of pursuing an exclusive draught policy violates Section 5 of the Federal Trade Commission Act. There is substantial evidence in the record to support the Commission's finding.

IV.

Coors asserts that it has the right to protect its quality product and not distribute its beer through central warehousing. The Commission held that Coors' prohibition of central warehouse sales, or a requirement that wholesale prices to those accounts equal those to other retailers is a substantial restraint on the capacity of the distributor to resell to whomever he chooses and threatens the same anticompetitive results as other illegal restraints on alienation. Therefore, the Commission found that the practices are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

The central warehouse method of distribution involves purchase by the warehouser of beer from the brewer or the distributor. The beer is delivered by the retailer to its outlets. This method of distribution could cut the price of the beer to the retailer and consumer. Coors eliminated sales to central warehouse accounts in 1964. The distributors viewed central warehousing as a threat to the integrity of their territorial restrictions. Coors alleges that sales to central warehousers affects the quality of its beer because of poor procedures used by the warehousers.

The Order imposed by the FTC does not prevent Coors' distributors from conditioning its sales to central warehouse accounts on the maintenance of procedures necessary to the quality control of its products. The Order only enjoins Coors from requiring its distributors from refusing to sell to central warehouse accounts. The restriction by Coors, limiting those with whom the distributors may deal, amounts to a restriction on resale and violates the mandates of *Schwinn* and the Federal Trade Commission Act. There is substantial evidence in the record to support the FTC's finding.

V.

Coors alleges that its contract termination rights are reasonable and legal and that its conduct in the rare instances of its use has been proper and legal in every respect. The Commission held that:

> Whether or not any actual terminations of Coors distributors, or sales forced by threat of termination can be ascribed entirely, solely and unambiguously to the failure of the terminated or coerced distributor to participate in an anti-trust violation, it is abundantly clear from the record in this case that Coors representatives have used the explicit or implicit threat or speedy termination is often successful in efforts to force the acquiescence of its distributors in anti-competitive behavior.

The Coors distributor contract provides in part as follows:

> This agreement and any supplements now or hereafter effective (whether fixing prices and terms to the Distributor, or otherwise) may be cancelled in entirety at any time by the Company for any breach by the Distributor on five (5) days' written notice to the Distributor. This agreement and such supplements may be cancelled in entirety by either party without cause upon the giving of notice to that effect to the other party, in which event termination shall become effective thirty (30) days after delivery or the mailing of the written notice of cancellation, whichever first occurs. * * * *

The Commission held that Coors used the threat of speedy termination to force its distributors into anti-competitive behavior. There is substantial evidence in the record to support the Commission's holding.

Coors has the right to terminate distributors according to the contract provisions which the distributors have agreed to. Bushie v. Stenocord Corporation, 460 F.2d 116 (9th Cir. 1972). However, it may not use the contract termination provisions to force its distributors into anticompetitive behavior.

The Law Judge was correct in stating that the termination provisions of Coors and its distributors, based upon their

contractual obligations, are a matter of private contract and are not subject to interference by third parties. The termination provisions are reasonable but may not be used by Coors to force any unlawful conduct. Therefore the Commission's attempt to rewrite Coors' contract termination provisions in paragraphs 12 and 13 of its Order must be set aside. The contract termination provisions do not violate Section 5 of the Federal Trade Commission Act.

VI.

Coors alleges that FTC internal procedures have prejudiced its right to a fair and impartial hearing. Coors asserts that Mr. Steinitz, a staff attorney of the FTC, performed investigative and prosecuting functions in preparing the case against Coors, and that he also participated in the review of the case as attorney—advisor to Commissioner Paul Rand Dixon in violation of 5 U.S.C.A. §554(d) and 16 CFR 4.7(a).

Coors' contention was not raised in the administrative proceeding and therefore is not properly before this court. Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411 (1958). In any event, Coors contention has no merit because Mr. Steinitz, in an affidavit in the record, states that upon leaving FTC's staff he did not discuss the merits of the Coors case with any of the Commissioners or the Commission's trial staff. There was no error.

VII.

Coors alleges that the provisions of the Commission's Order are not supported by substantial evidence, are not reasonable, are in conflict with important public policies, and must be rejected. It alleges that Paragraphs 4C, 5 and 7, if adopted, would force it to abandon its right tc choose those it will authorize to serve as its distributors in its marketing area, eliminating its ability to obtain required market penetration for its survival. Coors states that Paragraph 6, a formula devised by the FTC for beer rationing, is too simplistic to work effectively for Coors.

The Order by the Commission is reasonably related to the violations by Coors. The Commission is vested with wide discretion in its choice of remedy to cope with unlawful practices, and its choice will not be disturbed unless it has no reasonable relation to the unlawful practices found. Federal Trade Commission v. Mandel Brothers, Inc., 359 U.S. 385 (1959); Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608 (1946). Once the Government has borne its burden of establishing violations of the law, all doubts about the remedy are resolved in its favor. United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961).

We hold that paragraphs 1 through 11 of the FTC's Order are enforced; paragraphs 12 and 13 of the FTC's Order are set aside.

HOLLOWAY, Circuit Judge, concurring in part and dissenting in part:

I fully concur in the well-reasoned opinion of the court in upholding paragraphs 1 through 11 of the Commission's order and disagree only as to the setting aside of paragraphs 12 and 13.

It is true that paragraphs 12 and 13 require a substantial change in the contract provisions on termination of distributorships. However, the Commission has found that it is abundantly clear that Coors representatives have used the explicit or implicit threat of speedy termination in efforts to force acquiescence of its distributors in anti-competitive behavior. We are agreed that there is substantial evidence in the record to support the finding.

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices in this area of trade and commerce. See Siegel Co. v. FTC, 327 U.S. 608, 611. The courts interfere only where there is no reasonable relation between the remedy and the violation. Atlantic Refining Co. v. FTC, 381 U.S. 357, 377. And orders affecting contractual relationships have been upheld where unlawful practices involved similar subtle pressures and threats of termination of dealers' leases. Id. at 374-375.

On this record and findings made I would uphold as reasonable the Commission's choice of a remedy to cope with the unlawful practices.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mary Gardiner Jones
David S. Dennison, Jr.
Mayo J. Thompson

In the Matter of	)	
	)	
ADOLPH COORS COMPANY, a corporation.	)	DOCKET NO. 8845
	)	

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion having granted the appeal:

IT IS ORDERED that the initial decision be vacated and the appeal of complaint counsel be granted as provided hereinafter.

Accordingly, the following cease-and-desist order is hereby entered:

ORDER

IT IS ORDERED that respondent Adolph Coors Company and its subsidiaries, successors, assigns, officers, directors, agents, representatives and employees, individually

or in concert with others, directly or indirectly, or through any corporate or other device, in connection with the brewing, distribution, offering for sale or sale of beer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, maintaining, establishing or setting of the prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers.

2. Publishing, disseminating or providing any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any distributor to any retailer or any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any retailer to any consumer.

Provided, however, that nothing contained in this paragraph of the Order shall prohibit respondent from complying with the requirements of any state law, provided that when respondent purports to be complying with the state law regarding price suggestions, respondent will specifically advise the Commission of the statute and all court decisions and administrative agency decisions and rulings interpreting said statute pursuant to which it is purporting to act.

3. Publishing, disseminating or providing to any distributor or any retailer any information or suggestions concerning what Coors may believe to be an appropriate or proper mark-up or profit for Coors beer when the distributor sells to the retailer or when the retailer sells to the consumer or a mark-up or profit below which the distributor or retailer is advised not to sell Coors beer.

Provided, however, that nothing contained in paragraphs two (2) and three (3) of the Order shall prohibit respondent from publishing, disseminating, or providing any price list or other document indicating suggested prices for the sale of

Coors beer or suggested mark-ups or profits for Coors beer after three years from the effective date of this Order. Two years following the effective date of this Order respondent may petition the Commission, upon a showing that competition in the resale of its products has been restored, to be permitted to publish, disseminate or provide suggested prices, mark-ups, and profits as set forth in this proviso.

4. Refusing to sell beer to any Coors distributor or terminating or threatening to terminate any Coors distributor because:

A. the distributor has in the past or might in the future sell Coors beer at prices, mark-ups, or profits different from those approved or recommended by respondent;

B. one or more of the distributor's customers sold Coors beer or advertised Coors beer for sale at prices, mark-ups, or profits different from those approved or recommended by respondent;

C. the Coors distributor sold beer to another distributor or to a retailer whose business is located outside of the territory granted to the distributor; or

D. the Coors distributor distributes, has distributed, or proposes to distribute in the future the product of another brewer.

5. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct to fix, establish, limit or restrict the territory in which or the persons to whom a distributor may sell Coors beer.

Provided, however, that nothing contained in this paragraph of the Order shall prohibit respondent from complying with the requirements of any state law, provided that when respondent purports to be complying with a state law requiring the restriction of territories or customers, respondent will specifically advise the Commission of the

statute and all court decisions and administrative agency decisions and rulings interpreting said statute pursuant to which it is purporting to act.

6. Allocating Coors beer among its distributors in times of beer shortage at the Coors brewery, by any means other than by allocating shares to distributors equal to their proportionate purchases of Coors beer from the brewery during the last three months before the allocation or when the distributor has not been in business for more than a year as a Coors distributor, on some other equitable basis.

7. Refusing to deliver all of a distributor's order because the distributor has made sales to customers outside of the territory granted the distributor or because the distributor or the distributor's customer is selling Coors beer at prices, mark-ups or profits lower than those approved by respondent.

8. Prohibiting its distributors from selling for central warehouse delivery; provided, however, that respondent can establish refrigeration standards for the central warehouse which are substantially similar to those established for distributors and can require its distributors to be responsible, directly or indirectly, for maintenance of such refrigeration standards and for rotation of Coors beer in the central warehouse and at the retail delivery locations where the beer is redelivered from the central warehouse, if respondent changes its container dating system so that the retailer and the consumer will recognize the date without reference to a code or measuring stick.

9. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct with its distributors which has as its purpose or effect requiring that retailers serve Coors draught beer as their only light-colored draught beer.

10. Entering into, maintaining or enforcing any contract, agreement or understanding, or taking any action or course of conduct with any of its distributors which has as its purpose or effect the requirement that the distributor elimi-

nate, or refrain from obtaining and handling rival brands of beer in order to become or remain a Coors distributor.

11. Hindering, suppressing or eliminating competition or attempting to hinder, suppress or eliminate competition between or among distributors or between or among retailers handling Coors beer.

12. Cancelling any distributor agreement unless and until the respondent has pursued the following procedure:

A. Cancellation With Cause

(a) Respondent has given the distributor sixty days' notice of respondent's intention to cancel its agreement with the distributor;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise. Said notice shall further provide a list of the specific reasons for which the franchise is being terminated;

(c) Said notice will include the assurance that the distributor may sell his interest to a third party during the sixty days, subject to the respondent's approval of the buyer as a satisfactory distributor of respondent's products and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the distributor has the right to have the contract cancellation reviewed in an arbitration proceeding as hereinafter provided, to ascertain whether the termination has been made otherwise than in good faith and otherwise than for material violation of one or more contract provisions which are relevant to the effective operation of the franchise.

B. Cancellation Without Cause

(a) Respondent has given the distributor one hundred and eighty days' notice of respondent's intention to cancel its agreement with the distributor;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith. Said notice shall further provide a list of the specific reasons for which the franchise is being terminated.

(c) Said notice will include the assurance that the distributor may sell his interest to a third party during the one hundred and eighty days subject to the respondent's approval of the buyer as a satisfactory distributor of respondent's products, and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the distributor has the right to have the contract cancellation reviewed in an arbitration proceeding as hereinafter provided to ascertain whether the termination has been made otherwise than in good faith.

3. IT IS FURTHER ORDERED that respondent, within three (3) months from the date this Order becomes final, shall provide for arbitration, in the city in which a distributor resides, by an independent and neutral arbitrator, to determine in the case of any announced termination, and upon the request of a distributor, whether or not said termination is made in good faith (in the case of termination without cause) or whether or not said termination is made in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise (in the case of termination with cause). The arbitrator shall find that a cancellation of any distributor agreement is not made in good faith if the arbitrator finds that the termination would constitute a violation of the antitrust laws or this Order.

Said arbitration shall be initiated by respondent within fifteen (15) days from the date of a request by the distributor, which request shall be made not later than fifteen (15) days after notice of proposed cancellation. If respondent fails to provide for arbitration within the time limit, or if the arbitrator finds that cancellation is not proposed in good faith (and for material violation of one or more contract provisions relevant to the effective operation of the franchise in the case of termination for cause), respondent shall reinstate the distributor at the location he held prior to cancellation and shall allow the distributor to reenter into a distributor agreement.

All costs of arbitration, except for the distributor's attorney's fees, shall be borne by respondent, provided, however, that if in the course of the arbitration proceeding it is determined by the arbitrator that the distributor's claims are not brought in good faith, the distributor shall bear the costs of arbitration other than respondent's attorney's fees. The distributor's right to arbitration shall be conspicuously noted in all present and future distributor agreements.

IT IS FURTHER ORDERED that respondent corporation shall forthwith distribute a copy of this Order to each of its operating divisions, to its present and future sales representatives, to its present and future distributors.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergency of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may effect compliance obligations arising out of the Order.

In the event that respondent proposes a change in the corporate respondent, as set forth above, respondent shall require said successor or transferee to file, with the Commission, at the time of respondent's notification, a written agreement to be bound by the terms of this Order;

provided that if respondent wishes to present to the Commission any reasons why said Order should not apply in its present form to said successor or transferee, respondent shall submit to the Commission a written statement setting forth said reasons at least sixty (60) days prior to the consummation of said succession or transfer.

IT IS FURTHER ORDERED that respondent herein shall, within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

By the Commission; the matter was argued before Commissioner Thompson was sworn in. Therefore, he elected not to participate.

SEAL

/s/ Charles A. Tobin
Secretary

ISSUED: July 24, 1973

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mary Gardiner Jones
David S. Dennison, Jr.
Mayo J. Thompson

In the Matter of	)	
ADOLPH COORS COMPANY, a corporation	)	DOCKET NO. 8845

OPINION OF THE COMMISSION

By Dixon, Commissioner:

I. Background

The complaint in this matter charges that respondent has engaged in unfair methods of competition and unfair acts and practices in commerce to control the sale and distribution of Coors beer. After extensive hearings, the administrative law judge rendered his initial decision in which he ordered the complaint dismissed. Complaint counsel have appealed.[1]

The following facts are essentially undisputed. Respondent Adolph Coors Company (hereinafter sometimes referred to as Coors) is a Colorado Corporation engaged in the brewing, distribution and sale of beer bearing the trade name Coors. Its headquarters and only brewery are located in Golden, Colorado. Its gross sales in 1969, 1970 and 1971

[1] The Small Business Administration has also filed a brief on this appeal.

were $270 million, $300 million and $350 million, respectively. In 1968 Coors ranked fifth nationally in the volume of beer sold in the United States, and in 1969, 1970 and 1971 it ranked fourth.

Respondent's beer is marketed in the states of Oklahoma, Kansas, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Nevada, California and Texas. This eleven state area accounted for 21½% of the total U.S. beer consumption in 1970. (RX 1173G)[2] Respondent ranks first in the sale of beer in ten of these states and in its entire marketing area the average Coors market share is about 40%. On the average, Coors has about 2½ times the market share of its nearest competitor in this area. (Tr. 2887) The top four firms accounted for 64.3% of all beer sales in this market in 1970. On a state-by-state basis, in 1970, the four firm concentration ratio exceeded 80% in seven of the eleven states. (CX 2186, 2187)

Coors beer is marketed through 167 distributors. One hundred sixty-six of these distributors are independently owned and one, the Denver distributor, is a wholly-owned subsidiary of respondent.

Respondent's marketing department establishes the price for Coors beer. All beer is sold at the same price to all distributors f.o.b. Golden, Colorado, and this brewery price is communicated directly to the distributors at the time it is established. The distributor arranges for the transportation of the beer from the brewery and pays all freight bills directly to

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[2]The following abbreviations will be used throughout:

RX	–	Respondent's Exhibit
CX	–	Commission Exhibit
I.D.	–	Initial Decision
Tr.	–	Transcript of Hearings
RPF	–	Respondent's Proposed Findings
CPF	–	Complaint Counsel's Proposed Findings
CB	–	Complaint Counsel's Appeal Brief
RB	–	Respondent's Appeal Brief

the carrier. However, the distributor does not place orders with the brewery. The beer is sent to him by the brewery based upon the distributor's withdrawals from his warehouse. Respondent exercises complete control over the distributor's inventory. As William Coors, the President, Chairman of the Board, and Chief Executive Officer of respondent testified:

> We exercise inventory control over our distributors. They have no say as to what their inventories are going to be. We tell them the possible maximum inventory they may have at any one given time of the year, but whether we get that much beer in there or not is our affair, not theirs, because we have to work in and out of their inventories. (Tr. 2874)

Respondent enters into written contracts with all of its distributors and each contract contains a clause specifying a certain limited area in which the distributor may sell Coors beer. The contract specifically provides that "While this agreement is in effect, the Distributor will conduct the business of the wholesale distribution of Coors beer in the above territory only." (CX 351B, 352B)

Respondent also includes in its contracts with distributors a clause providing for cancellation of the agreement (a) by respondent, for breach of the agreement by the distributor on five days' notice to the distributor, and (b) by either party, without cause, upon giving thirty days' notice. (CS 351, 352)

II. The Initial Decision

The complaint alleges (1) that respondent has fixed and controlled the prices at which its distributors and retailers sell Coors beer; (2) that it has imposed territorial restrictions on its distributors; (3) that it has joined with its distributors to have Coors beer sold as the only light draft beer in taverns; (4) that it has prohibited its distributors from selling to central warehouse accounts; and (5) that it has included thirty and five day cancellation periods in all of its distributor

contracts and restrained its distributors to purchasers of their own choosing and at prices freely determined by the seller and the buyer.

The administrative law judge ruled that complaint counsel had failed to establish by a preponderance of the evidence that respondent had engaged in any unlawful practices and further held, *inter alia*, that the conduct of respondent was shown to be both reasonable and pro-competitive and that the Commission's attempted interference with respondent's distribution contracts in the areas of central warehousing, territorial restrictions, and termination provisions, if successful, would violate respondent's liberty and property rights as guaranteed by the Fifth Amendment of the Constitution.

We find from a review of the initial decision that the administrative law judge relied to an extraordinary degree upon the proposed findings and conclusions of law submitted by respondent. We are, indeed, unable to ascertain from the initial decision whether the administrative law judge had any views distinguishable from those of respondent on any of the major issues in this case. He may well have based his initial decision upon a consideration of the whole record as required by §3.51(b) of the Commission's Rules of Practice but, if he did, it is not apparent from the initial decision itself. Our own review of the record discloses that the analyses of the testimony of certain key witnesses contained in the initial decision bear little resemblance to what these witnesses actually said. The findings of fact are based to a considerable extent on bits and pieces of unsupported and self-serving testimony, much of which is contradicted by documentary evidence. Most critically, it appears that much of the evidence relied upon by complaint counsel is simply ignored. The initial decision thus presents a distorted view of the record and is of little assistance to the Commission in resolving the issues raised in this appeal. The findings of fact and conclusions of law, as set forth in this opinion, will thus be substituted for those contained in the initial decision.

III. Price Fixing

A. Background

Respondent's pricing philosophy is spelled out in the "Coors Policy Manual" and in the testimony and statements of Coors officials. Basically, this philosophy is that the brewer, the distributor, and the retailer should sell Coors beer at prices which will provide them a fair return on their investments. (Tr. 2885) According to the Coors Policy Manual (in effect from 1965 to June 1970) the "Coors pricing policy" applicable to wholesale and retail prices is that:

> In order to maintain a successful wholesale or retail business, pricing integrity is essential. Pricing integrity will result in an adequate and equitable profit to both distributor and retailer and is fair to the ultimate consumer.
>
> It is the policy of the Adolph Coors Company to suggest, if it so chooses, to either the wholesaler or retailer level, suggested minimum pricing. We reserve the right to further that policy by simply refusing to deal with anyone who doesn't adhere to such policy.
>
> The Adolph Coors Company and its agents must only state the policy. They cannot make agreements, threaten, coerce, or intimidate wholesalers or retailers in any manner. They can enforce the policy only by reserving the right to refuse to deal with those who don't adhere to the suggested prices. (CS348Z-104, 105)[3]

It is Coors' position that the company must exercise some control over the price at which distributors sell in order to guarantee the company its share of the market. (Tr. 2890) There is also a Coors policy against giving deals to its distributors and, insofar as possible, a policy to discourage

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[3]The quoted portions of the Policy Manual were amended in 1970, subsequent to notification to Coors that price fixing matters were being considered by Commission investigating attorneys. (RX 1047X)

distributors from giving deals or discounts to their customers. (Tr. 2895-96) Moreover, it is the company policy that distributors should not pass on any cost savings they may realize in servicing retail accounts and, in fact, the distributors' prices to retailers do not reflect such cost savings. (Tr. 2887-88)

The Coors Policy Manual also makes clear that the company regards as extremely vital any information which Coors representatives can provide concerning the prices at which Coors beer is sold. The manual specifically states, in this connection, that "The Representative will keep the Golden Sales Office informed at all times, on forms provided or by any other written means applicable, of all updated price changes and price information, both wholesale and retail." (RX 1047Z-108) The Coors sales representatives are thus required to report both wholesale and retail prices. Distributors are also required to notify Coors of proposed price changes. (Tr. 1153) These reports are reviewed by company officials in Golden and when prices are found to be out of line a Coors official contacts the division manager who instructs the Coors area sales representative to discuss the matter with the distributor. (Tr. 1144-45) Distributors are also required to monitor and report retail prices (Tr. 1138-41) and, if the retail price is too high or too low, they are expected to persuade the retailer to bring it back in line with Coors suggested price. (Tr. 1142)

The Coors pricing philosophy is further reflected in the following summary of comments made by Harvey Gorman, respondent's sales manager:

> We feel we must continue to keep control of our product. We feel we must have an agreement on prices of our product with our distributors looking at the whole future picture. We do have the right to control our product *by agreeing individually with each distributor* (emphasis in original). (CX 382B)[4]

[4]Respondent attempts to explain this statement by contending that the reference to an agreement on price concerns the price the brewery charges the distributor rather than the price at which Coors beer is sold

The record also contains testimony of a distributor to the effect that it was his understanding of the Coors pricing philosophy that he should be in agreement with Coors on his selling price (Tr. 461-62), and evidence of another distributor's irritation at Coors "dictating" pricing to distributors. (CX 383)[5]

B. Wholesale Price-Fixing

We will consider first the charge that respondent has fixed and controlled the wholesale prices at which its distributors sell Coors beer. We note at the outset that there appears to be less disagreement between counsel as to the facts relating to contacts and communications between respondent and its distributors concerning the latter's pricing of Coors beer than there is with respect to the words which should be used to describe or characterize this relationship and the law governing it. Complaint counsel speak of "price negotiation," "combinations," "agreements" and "price maintenance," while respondent prefers to use such terms as "discussions," "suggested prices," "voluntary acquiescence," "independent decisions" and "pricing integrity."

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[4](Continued)
by the distributor. In other words, respondent would have us believe that it agrees with each distributor individually on the price that it will charge the distributor for Coors beer. This explanation, however, is contradicted by respondent's proposed finding that Coors' marketing department establishes the price for Coors beer; that all beer is sold at the same price to all distributors; and that these prices are communicated to the distributors when they have been established. (RPF 135) The record is devoid of any evidence which would indicate that distributors have anything whatsoever to say about Coors' brewery prices.

[5]Respondent contends that this distributor was talking about Coors' brewery price and not its attempt to control the wholesale price. Here again respondent's argument is inconsistent with the record evidence. The document in question shows clearly that this distributor was referring to Coors' refusal to permit him to increase his own price 5 cents.

Respondent readily concedes that its sales representatives discuss with Coors distributors the prices at which Coors beer will be sold to retailers and that the representatives suggest prices or ranges of prices at which the beer should be sold. It is respondent's position that the law does not prohibit a manufacturer from securing the "voluntary acquiescence" of its customers in prices which it may suggest by announcing its pricing policy and discussing this policy with its customers. According to respondent, "It is only when the manufacturer goes beyond the announcement of his policy and discussion of same on his [sic] own merits and through coercive devices secures adherence to its policy, then a violation of the antitrust laws including Section 5 of the Federal Trade Commission Act is made." (RPF 105) Respondent further contends that it has never threatened or coerced a distributor in any respect regarding prices.

We believe respondent is wrong with respect to both the law and the facts. Vertical price fixing agreements are unlawful whether entered into voluntarily or as a result of coercion, *Dr. Miles Co.* v. *John D. Parke & Sons Co.*, 220 U.S. 373 (1911); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 151 (1968); *Pearl Brewing Co.* v. *Annheuser-Busch, Inc.*, 339 F. Supp. 945, 955 (S.D. Tex. 1972), and the record conclusively establishes the existence of price fixing agreements between respondent and its distributors, both voluntary and coerced.

There is ample evidence in the record to demonstrate respondent's superior economic power *vis-a-vis* its distributors. The fact that respondent has on file the names of 7,000 persons who are interested in becoming Coors distributors (Tr. 2477-78) and the further fact that respondent can terminate a distributor on 30 days' notice without cause, in themselves support this conclusion. We note, in this connection, that respondent's policy manual in use prior to the initiation of this proceeding states that the business practices of a distributor which do not agree with the policies of the Adolph Coors Company will be discussed in the main office in Golden, Colorado, with the distributor and that:

> "If a solution cannot be worked out in a reasonable length of time we will refer to the terms of the

distributor's contract. All distributor terminations will be made through the Golden office . . . ." (CX 349H)

The following testimony by Mr. William Coors also reveals clearly the distributor's dependence upon respondent and respondent's awareness of the distributor's subordinate position:

Q You were talking about the importance of independent distributors to your system. You stated they had done a remarkable job today. Do you think it would be sort of a madness to change from the current system? Has Coors ever considered alternate methods of distribution?

A Oh, yes.

Q Has it considered distributing beer itself?

A Oh, yes, absolutely.

Q Is it still considering that?

A Yes, as an alternative, an ace in the hole. Let's put it this way. The plans are all laid.

Q Are your distributors aware of that?

A Yes. I told them just two weeks ago. Every one of them knows except two of them that didn't show up for the meeting.

Q What response did they make to that?

A Well, the room was remarkably silent.

Q Did you consider that a silence of shock?

A Yes.

Q Would your distributors welcome your going into direct distribution?

A They know we wouldn't do it unless we were forced into it.

Q And they wouldn't welcome it, would they?

A No, they wouldn't.

Q From your knowledge of distribution, is return on investment capital justifying your going into such a program?

A We have set up models on this and it is our opinion that we could increase our cash flow by 50 per cent by going to selfdistribution. From a monetary standpoint, the concept is extremely tempting. (Tr. 2905-06)

The record discloses that respondent used its superior bargaining position, including threats of termination, to force distributors to sell at prices acceptable to respondent. One of these instances involved Mr. Jay Wagnon, owner of Coors distributorships in Kansas and Oklahoma. According to Mr. Wagnon's uncontradicted testimony, he refused to follow wholesale prices suggested by a Coors sales representative in August 1970. He was then asked by a Coors official to come to Golden, Colorado, where he met with the Coors sales manager, Mr. Harvey Gorman, the division manager, Mr. Ken Golightly, and the sales representative, Mr. John Kiser. He was told that his prices were unacceptable to Coors and the suggestion was made to him at that meeting that he sell at the prices previously proposed by Coors. The nature of this "suggestion" is apparent from the following testimony:

Q Did you agree to those prices at that time?

A No, sir.

Q What did you say?

A I'd like some time to think about it.

Q Did they say anything to you at that point?

A They asked me to give them an answer at the Kansas Wholesaler Malt Beverage meeting, which was going to be in September.

Q Did they make any suggestions to you as to what would happen if you didn't follow this suggestion?

A I was told that they could put another distributor in the Wichita area to compete with me.

Q Did they tell you anything else as to what might happen? Any other suggestions that they made?

A Mr. Golightly asked me if I ever thought about selling the Oklahoma distributorship, since I was an absentee owner and I told him, no, I hadn't.

Q Had you gone to Golden, at that time, to discuss your Oklahoma distributorship?

A No, sir.

Q What caused him to bring this up, do you know?

A I don't know.

Q Did you want to sell your Oklahoma distributorship?

A No, sir.

Q Did you understand his suggestion as to selling your Oklahoma distributorship as a threat?

A I was afraid it was. (Tr. 459-60)[6]

In October 1970 there was further discussion of Wagnon's prices between Coors representatives and Mr. and Mrs. Wagnon. (CX 371) Immediately thereafter Mr. Wagnon wrote a letter to the division manager proposing another price schedule but received no reply. In early March 1971 a meeting was held in Mr. Wagnon's office between Mr. Wagnon, Mr. Kiser and Mr. Linn who had replaced Mr. Golightly as division manager. Again Mr. Wagnon refused to change his prices (Tr. 464-65) About two weeks later, accord-

[6]The record also discloses prior disagreements on pricing between Wagnon and Coors and that Wagnon realized he had "little choice" but to accept Coors' suggested pricing. (CX 84).

ing to Mr. Wagnon, he again met with Mr. Kiser and Mr. Linn and, although he at first refused to change his prices, finally agreed to a schedule of prices which was to become effective July 1, 1971 (Tr. 465-66) and these prices were put into effect on that date. (Tr. 467)[7]

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[7]The administrative law judge disposed of the above testimony by stating "On direct examination, there is considerable testimony relating to discussions with reference to prices charged the retailers by Mr. Wagnon and the suggested prices made by Coors representatives and officials, some of which he followed and others that he refused to put into effect. In view of the admissions made by the witness on cross-examination, it would not serve any purpose to go into the details of the direct examination." (I.D. p. 14) This was egregious error. Mr. Wagnon's testimony on cross-examination was perfectly consistent with his direct testimony. He reiterated that he had entered into an agreement with Coors on the prices he would charge. (Tr. 511) That Mr. Wagnon's son prepared the price list finally adopted, CX 2132, a point stressed by respondent's counsel, does not alter the fact that the list was prepared only after the process of bargaining, coercion, and agreement between Coors and Wagnon described in Mr. Wagnon's direct testimony.

By Mr. Bradley:

Q But my point is, though, you prepared this Commission's Exhibit No. 2132, Robert Wagnon did.

A After it had been agreed upon.

Q I don't care about that, you prepared that, Robert Wagnon did, and these are the prices that your firm had agreed to charge for beer as of July 1, 1971?

A Yes, sir. (Tr. 512)

Continuing this line of questioning, respondent's attorney concluded his cross-examination by asking the witness whether it was not true that he had always made the final decision as to the prices at which his firm sold. Mr. Wagnon answered in the affirmative stating that he had "testified to that previously." (Tr. 512) His previous answer to a similar inquiry was that he made the final decision as to the prices he would charge if such prices were "acceptable" to the Adolph Coors Company. (Tr. 509)

Mr. John Hemphill, a former distributor of Coors beer in Oakland, California, testified that changes in his wholesale prices could be made only with Coors' approval and that a distributor "can only go so far making a request" for a price change in view of the 30 day termination clause in his contract. (Tr. 1380-81) He further testified that he had objected to a price proposed by Coors for seven ounce cans and had failed to post this price by the date specified by Coors. Thereafter, according to Mr. Hemphill:

> ". . . Mr. Weaver [Coors area representative] came into the office and said, 'now, listen, I am sick and tired of coming into this office and talking about prices and territorial restrictions, now, if you fellows don't wish to abide by the philosophies, the policies, the recommendations of the Adolph Coors Company, then the best thing you can do is not be a Coors distributor.' So naturally the argument ceased." (Tr. 1382)

Mr. Hemphill testified that his firm then posted the price proposed by Coors. (Tr. 1383)[8]

The record also reveals that distributors regularly submitted to Coors for approval or acceptance price changes which they proposed to put into effect or counter-proposals to price changes suggested by Coors. The record further shows that prices would not become effective unless and until they were

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[8]The judge concluded, from the fact that Mr. Hemphill had sued Coors in a private action for unlawfully terminating him, and on general grounds of demeanor and the nature of his answers, that Mr. Hemphill's replies could not be given great weight. We find it odd, though hardly inconsistent with other aspects of the initial decision, that the judge should use Mr. Hemphill's litigation with Coors as a basis for disbelieving *his* testimony regarding the termination, but not as a basis for discounting the reports of Coors representatives concerning the termination. In any event, contemporaneous documents prepared by respondent's own representatives do tend to confirm Mr. Hemphill's contentions regarding disputes with Coors concerning his pricing policies. (CX 482, 486)

satisfactory to Coors. For example, a report by area representative, James Hayden, to Robert Eke, sales department administrative assistant, for the week of December 7, 1968, concerning a meeting with distributor Joe G. Maloof and Company, Albuquerque, New Mexico, states as follows:

> I met with George and Mike Maloof and we discussed their thinking on the 12 ounce can price structure in New Mexico. I told them that their ideas would be forwarded to Golden and that the brewery's thinking would be forthcoming. A pricing report was compiled along with recommendations and sent to Bob Eke. (CX 110)

A subsequent report on the same subject by the same area representative stated:

> "I received information from Bob Eke on recommended pricing guidelines for the 12 oz. ring-pull cans. George and Mike Maloof and myself utilized this information along with market conditions, pricing philosophies, and came to a mutual understanding that was approved by Bob Eke . . . ." (CX 111)

The following comments appear in a report of January 27, 1968, prepared by area representative Max Abbott concerning the prices charged to military establishments by distributor The Foster Co., West Sacramento, California:

> ". . . While talking to the bookkeeper [Frank Morrow] . . . I mentioned military prices, which I have been told repeatedly are regular price less state tax. Mr. Morrow, who evidently hadn't been let in on this fact, . . . informed me that they are and have been cutting military prices for sometime. Jack Sear, though I am afraid is just the fall guy on this, of course has deliberately lied to me and Coors about this and to the personnel here. They have informed me on several occasions that they are selling their military at regular less state tax. In fact they re-assured me of this on my last visit. Now I find they are cutting the price up to 25¢

a case. I am afraid this is old stuff with the Foster Co., just when you think you are making progress here, something like this comes up and you find out you can't believe a word they tell you." (CX 500)

In a subsequent report, dated April 6, 1968, Mr. Abbott states that he talked with Helen Foster and Nick Zoulas of the above company and that one of the subjects he discussed was "Lying to us about what they are charging to the military." He pointed out, however, that "They have agreed to change their military price to the regular price less state tax. This will be done on the next regular posting." (CX 501A and B) Mr. Abbott's next report, dated May 18, 1968, assured the Coors sales manager that "They have officially changed their prices at the military price. I saw the postings. Military prices now regular price less state tax." (CX 503)

The above documents and other evidence adduced by complaint counsel clearly reveal a process of discussion and subsequent agreement between Coors and its distributors as to the prices the latter would charge[9] and further establish that in many instances the distributors were induced to agree to make pricing decisions substantially different from those they would otherwise have made had respondent not interfered.

To offset the documentary evidence relied upon by complaint counsel, respondent called as witnesses some of the persons who had prepared the documents in question and elicited from them testimony to the effect that there had been no price agreements and that respondent did not require the distributors and brokers to adhere to resale prices which it recommended. It is well established, however, that little weight can be given to testimony which is in conflict with contemporaneous documents, particularly when the crucial issue involves mixed questions of law and fact. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1948). The testimony by certain distributors that they set their own prices is thus contrary to the weight of the evidence.

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[9]See CX 247, 277, 256, 306, 330, 340, 6, 125, 104, 144, 28A, 838 among other representatives reports.

Moreover, the fact that certain distributors may have accepted respondent's suggested prices or otherwise set prices acceptable to respondent without the necessity for bargaining, coercion, and subsequent agreement, simply does not negate evidence of complaint counsel that such illegal price fixing occurred in the cases of other distributors. See *Basic Books, Inc.* v. *Federal Trade Commission*, 276 F.2d 718, 720-21 (7th Cir. 1960).[10]

C. Retail Price-Fixing

The record also establishes that respondent has a resale price maintenance program and that it has in some cases secured adherence to its suggested retail prices by unlawful means. The existence of such a program, as well as its purpose, is best demonstrated by the following statements made in discourse with a retailer by a Coors representative:

> Oh, well, yes, Mr. Letcher, we couldn't care less about competitors. As far as we are concerned, we think they are all fine, they are fine people, we don't have any arguments with them at all, but we do have certain beliefs just like yourself and certain policies on our product that we like to follow and this isn't only true here, it is true everywhere. We know for a fact that we have the prerogative to not sell to price cutters. We can't come in here and tell you what to do because this is your prerogative what you do, but it is our prerogative

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[10]It is understandable that many distributors might be unwilling to testify adversely to respondent. As pointed out in a study, entitled *"Brewer-Wholesaler Relationship,"* which was introduced into evidence by respondent ". . . The reluctance of many wholesalers to testify against brewers at government-sponsored investigations must be attributed in part to a fear of retribution by the brewers." (RX 1079, p. 23) Furthermore, it may not be irrelevant that many of the distributors who gave testimony favorable to respondent did so after attending the meeting at which William Coors announced that Coors was considering distributing its own beer as "an ace in the hole," that "the plans are all laid" and that the distributors "know we wouldn't do it unless we are forced into it."

also not to sell to people who degrade the image of our product. All we want to do is sell to the people that will make a fair profit and we will get along fine. (Tr. 837-38)

* * *

Well, I understand your situation, but quite frankly, as I said before, we have the same policy throughout all of our marketing areas, no matter if it is the biggest retailer or the smallest one, we have the same belief. As a matter of fact, the biggest retailer in the United States, probably we have had an understanding with them on that and they hold our prices up all the time. Now, they felt maybe the same way you did first, but now they look at it this way. No other brewery but Coors, that we know of, has this kind of belief, this strong belief about pricing. So they go ahead and do whatever they want to with them, but with Coors, in order to keep Coors, this is the only way we will stand. We don't want it to seem like we are being overbearing about it. It is a policy we have had before we came in to Brownwood. It is a policy we will have when we go into any other market. We have had it for years and years and this is the way we have built our reputation, our quality image. We know for a fact once we sell the beer to you we cannot tell you. (Tr. 839-40)

* * *

We are real proud of our record wherever we are and we feel it has been built not only on a quality product, which we feel we have, but also on an image that is created of being quality. The only way we are able to maintain that image is to not let our product be price cut, cut down and chopped down and degraded in image by prices. If a product is worth a certain amount, we think it should sell for that. We definitely are firm believers in our retailers making a profit. Once a retailer cuts our product, he is not making the profit he should and he is also degrading our image that we are so

concerned with. We not only spend a lot of money on the product in making a quality product, but we want to let the people know and realize that it is quality. So this is the reason I certainly wanted to come by here today. (Tr. 841-42)

* * *

Well, here again we are not only referring to advertising in the paper, we are referring to the actual retail prices you are selling it for, in other words, what you price that for. It isn't only the advertisements in the paper that we are concerned about. It is the product, what it actually sells for. We will not tolerate price cutting. (Tr. 843)

* * *

Of course here again we are talking about what we believe. We are not trying to dictate anything. All we have is a belief and once a person gets the beer, it is your preorgative to do whatever you want to do with it, but that doesn't mean we have to reservice you. (Tr. 845)

* * *

If you sell the product for what it should be sold for, make a profit on it. We are asking one other thing, this is between you and our distributor, I would suggest this, if you decide that you want – we would like to have your business over there just like we have got it here, the same condition where you keep our product up, no specials, no cutting prices on it, keep it there, we could care less what you do with the rest of the beer, that is your business and their business. If you keep our beer at the same price, don't cut it, we would like to have the same relationship that we have here. (Tr. 846-47)

* * *

Well, actually as far as we are concerned, approach it the same way, they are not putting our beer on

specials, they are not putting it in the paper, they are not cutting it, you are not having any unfair competition by this. We will be treated the same way by you as we will by them. That is fine with us. Where we don't have any price cutting or any advertising, that is all we ask and that is the reason I came by to have a man to man business talk with you. We want to show our appreciation, our respect, and let you know that we would respect your business and we would like to have it under these conditions, but this happens to be a basic brewery policy and we have had it for years. We had it before we came into Brownwood and we will have it forever as far as we are concerned because we find that it is the best policy we can have. (Tr. 848-49)

Another Coors representative commented as follows with respect to specific instances of retail price cutting in a report of a visit to distributor John P. Ward, Inc., Kansas City, Kansas:

> Problems of discount stores, Kroeger's, Tempo, etc., ordering large quantities of beer, 100 to 500 cases of Coors, to promote business by selling at low prices are being experienced in our distributorships. The approach to this problem was discussed this week with the Wards and Gordon McManamon from Junction City. Prior to this the same matter which occurred in Lawrence was resolved with Eldon Danenhauer. *Guidelines have been suggested in order to avoid this type of business practices; not enough inventory, not in keeping with distributor policies of inventory control for fresh beer, refrigerated marketing, etc. All distributors were advised to avoid discussing cost or pricing in any form.* (Emphasis added) (CX 941)

A former Coors distributor in Del Rio, Texas, Mr. Robert Dixon, testified that one of his retailer customers was selling Coors beer on "specials." A Coors sales representative, Mr. Linn, met with the retailer in the distributor's office and attempted unsuccessfully to dissuade him from advertising special sales. After the retailer had departed the distributor

asked what would be done if the retailer refused to cooperate. According to the distributor Mr. Linn stated:

> ". . . 'Well, we just won't sell them any beer.' And I said, 'Well, he is a good customer of mine. What position would that put me in if I didn't sell him beer?' He said, 'We can just keep cutting down on beer. You won't get that much beer to sell, because we don't have the beer to sell on a special like that.' And they evidently did because I didn't get any beer." (Tr. 1565-66)

As indicated by the above statements, respondent has enlisted the aid of its distributors in securing retailers' adherence to suggested minimum prices. The following excerpts from Coors area representatives' reports demonstrate the distributor cooperation as well as the methods used to obtain compliance at the retail level:

In a report of a visit to distributor Coleman Distributing Co., Brownwood, Texas, the representative stated;

> "Coleman reports Schlitz beer still has many retail deals going and one retailer (I have enclosed an advertisement from a newspaper) is selling Schlitz cans for 89¢ a 6 pk. This is the same store that was cut off by Stuart Coleman because they were advertising our beer at cut prices." (CX 203)

The same representative made the following comment in his report of a visit to distributor Willowbrook, Inc., Dallas, Texas;

> "Only one pricing problem occurred this week. The Robinwood Liquor (at Inwood and Maple St.) cut prices from our suggested $1.35 per 6 pack to $1.10 and from $4.75 to $4.40. Ray Willie [the distributor] contacted this retailer and explained our desire for him to make the suggested profit. He refused to raise his prices, however, and Mr. Willie plans to take appropriate action." (CX 208)

And the same representative referred to another price cutting problem in a subsequent report of a visit to the same distributor;

> "Willie reports that the Skagg discount store which was cutting our prices last week has not done so since Willie has talked to the top man in this organization and he promised that they will not do so. We will wait and see what happens on this." (CX 224)

He reported as follows with respect to a visit from a Ft. Worth distributor:

> "Only one problem on pricing so far. One account was cut in our 6 pack can prices and Ed Curtis called on this retailer and there was no problem. He immediately raised our prices within normal limits. Several retailers have been advertising in the local newspaper but all are within normal price limits . . . ." (CX 263A)

And in a subsequent report of a visit to this distributor he stated;

> "Pricing of our product has been very favorable. Retailers are pricing reasonable. One problem did occur at the cutrate drug in Ft. Worth advertised our 6 pack at $1.05, which was out of line. Distributor personnel talked with this account Friday and beer was not delivered on that day . . . ." (CX 264)

In January 1968 the Coors representative in Reno, Nevada, reported that;

> "Retailers continue to disregard the recommended prestige mark-up on selling price in favor of keeping Coors priced at competitive levels. Frank [Frank Knafele, a distributor] and I are going to call on off-sale accounts on February 5 to survey this program." (CX 92)

The representative and the distributor called on various stores and explained the Coors pricing concept but the floor

manager informed them that they would not stop price cutting unless all others agreed to do so. The representative expressed the view in his report that the distributor could be a "leader in attempting to direct the wholesalers in firming up price policies in this area . . . ." (CX 93) The representative and distributor continued to work to get retail prices up and in June the representative reported that the local distributors had held a meeting ". . . to attempt to find ways to curtail the price cutting at the retail level on many brands of beer in this area." (CX 97) In January 1969 the Coors representative, the division manager, and sales manager met with the Reno and neighboring Coors distributors to discuss retailer price cutting. (CX 99) By July 1969, the Coors representative "could not find any evidence of Coors being sold at reduced prices" in Reno or in five neighboring towns. (CX 102B)

Another documented incidence of resale price maintenance involved Mr. Harold Letcher, a retailer with a store in Brownwood, Texas. Mr. Letcher had advertised Coors beer at retail prices on week-end specials. He was warned by the Coors distributor, Mr. Stuart Coleman, to discontinue the practice and, when he refused to do so, Mr. Coleman stopped delivering Coors beer to his store. (CX 2095; Tr. 894, 907) Mr. Coleman later advised him that deliveries would be resumed if Mr. Letcher agreed to discontinue advertising week-end specials on Coors beer. (Tr. 777, 895-96, 908-09) Mr. Coleman also stated that he might lose his Coors distributorship if he continued to sell to a price cutter. (Tr. 794-97, 908-09) Thereafter, Mr. Letcher wrote a letter to Coors advising that he had been terminated by his distributor on the instruction of the Coors area representative. (CX 2005) In response thereto the Coors representative called on Mr. Letcher and informed him that deliveries would be resumed if he stopped discounting Coors beer. (Tr. 787-88; CX 195) Mr. Letcher refused and again appealed to officials in Golden, Colorado. The Coors representative again visited Mr. Letcher and again advised him that he could purchase if he stopped advertising week-end specials, and stopped discounting. (CX 197; Tr. 843) Mr. Letcher again refused and consequently was unable to purchase Coors beer from Mr. Coleman or any other Coors distributor. Mr. Letcher subsequently sold his

store in 1971 and soon thereafter Mr. Coleman resumed delivery of Coors beer to the new owners who purchased it with the understanding that they "couldn't run it on special or advertise in the paper." (Tr. 912)

Coors' argument that its conduct was a legitimate exercise of its rights under the *Colgate* doctrine[11] is rejected. According to the *Colgate* decision:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. (At. p. 307)

In *Parke, Davis and Co.*[12] the Court further elaborated on this doctrine, holding that:

> The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right "freely to exercise his own independent discretion as to the parties with whom he will deal." When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act.

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[11] *United States* v. *Colgate and Company*, 250 U.S. 300 (1919).
[12] *United States* v. *Parke, Davis and Co.*, 362 U.S. 29 (1960).

> Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. (At p. 44)

On the basis of the record in this case, Coors' pricing policy and its multifaceted activities in support of that policy cannot possibly be construed as simply an exercise of its right to select persons with whom it will, or will not, deal. Indeed, Coors has expressly denied that it ever put into effect that portion of its policy reserving the right to refuse to deal with persons who do not adhere to its suggested prices. (RB 24) Thus, by its own admission, any attempt by respondent to secure adherence to its suggested prices has been by means other than those deemed permissible by *Colgate*.

In summary, we find that respondent has pursued a policy of fixing, controlling and maintaining prices at which Coors beer is sold at both the wholesale and retail level, that in furtherance of this policy it has engaged in various acts and practices such as: suggesting resale prices to both distributors and retailers, checking prices at which distributors and retailers sell Coors beer, advising distributors and retailers that it is contrary to Coors pricing policy for them to deviate from prices approved by respondent, threatening to terminate distributorships and threatening to force distributors to sell their businesses for refusing to adhere to suggested retail prices, entering into agreements and understandings with distributors as to the wholesale prices which the distributors will charge for Coors beer, joining with distributors in attempting to coerce retailers to refrain from selling Coors beer at prices below those approved by respondent, encouraging distributors to prevent retail price cutting by refusing to deliver Coors beer to price cutters, or to reduce the amount of beer delivered, and entering into agreements and understandings with retailers as to the retail prices or range of prices at which such retailers will sell Coors beer.

The order entered in this case, in addition to prohibiting illegal price-fixing agreements and efforts to coerce and induce the same, further enjoins, for a period of three years, the use of suggested resale price lists and suggested mark-up lists.

(Paragraphs 2 and 3) Respondent may petition the Commission, after a period of two years, for relief from these paragraphs upon a demonstration that competition in the resale of its products has been restored.

While dissemination of suggested resale price lists and suggested mark-up lists is not in itself illegal, the practice may lend itself to dire anticompetitive uses when accompanied by the efforts shown here to induce and coerce adherence to, and agreement with, the suggestions. Elimination of the use of such suggested resale price and mark-up lists by respondent for a short period will facilitate enforcement of the basic prohibition in Paragraph 1 against price-fixing agreements, and help to eliminate the residual coercive effect that may attach to the use of such suggestions by virtue of respondent's past practices in forcing compliance. Paragraphs 2 and 3 are necessary to restore the independence of Coors distributors and retailers in making pricing decisions that has been eliminated by respondent's conduct. Following the three-year period (or two years, if the requisite demonstration can be made), respondent may again employ suggested resale price and mark-up lists, but will still be prohibited from illegal efforts to secure adherence to them. See *Lenox, Inc.* v. *Federal Trade Commission*, 417 F. 2d 126 (2d Cir. 1969).

IV. Territorial Restrictions

It is not disputed that respondent has contracted with each of its distributors to limit the territory within which each may resell Coors beer.[13] The Coors distributor contracts provide:

> "While this Agreement is in effect, the Distributor will conduct the business of wholesale distribution of Coors beer in the above territory only." (CX 351B, 352B)

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[13] Coors sells beer to its distributors f.o.b. Golden, Colorado (Tr. 2864); title would thus appear to pass to the distributors prior to any resale of beer on their part.

The preponderance of the evidence indicates that the company vigorously enforces its territorial restrictions. (Tr. 1130-31, and citations below) Respondent admits that in "a few" cases it sought to determine which of its distributors had made an extra-territorial sale when one was reported. (Answer, p. 5) At trial, numerous instances were shown in which Coors sales representatives in the course of their routine duties investigated reports of sales being made outside an assigned territory (CX 203, 207, 328, 829B, 914A, 921; Tr. 411), and evidence further revealed instructions by sales representatives to cross-selling distributors to cease extra-territorial sales. (CX 196, 198, 244, 513, 552A, 625A, 715A; Tr. 710, 1423) Disregard of such warning might lead to threats of cutbacks in the amount of beer delivered by the brewery (Tr. 1164, 820-821) and threats of termination. (CX 250-51; Tr. 782, 785-86, 1571)

The effect of these territorial restrictions is that "[i]n a given territory, there is no intra-brand competition." (CX 2029A) The territorial restrictions are an obvious adjunct to Coors' efforts to control the prices at which its distributors and their retail accounts dispose of the product. The distributor knows that he will experience no intrabrand price competition without respondent's consent, and that if he cuts off a retailer for price cutting that retailer cannot buy Coors beer from anyone else. According to the testimony of William Coors:

> Q What is your philosophy on the pricing of your product?
>
> A We like to see our product a little way down the line so that the brewer, the distributor, and the retailer get a fair return on their investment capital and on their efforts.
>
> Q What is your philosophy on territorial limitations within which your distributors may market?
>
> A We think they are absolutely necessary to insure this. (Tr. 2885)

In addition to the utility of exclusive territories in insuring that Coors' prices will remain "a little way down the line," and that brewer, distributor, and retailer will thus receive a return presumably greater than the rigors of unrestrained competition would confer, respondent argues, and the administrative law judge concluded that:

> "The territorial restrictions vertically imposed by the Respondent upon its distributors, are reasonable and essential to achieve market penetration and quality control, the factors that enable the Respondent to stay in and survive in the highly competitive beer industry, thereby promoting vigorous inter-brand competition.' (I.D., p. 154)

Complaint counsel argue, contrarily, that whatever the utility of the territorial restrictions, they must nonetheless be held to be *per se* illegal under the Supreme Court's decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). There the Court noted that:

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict the territory or persons to whom the product may be transferred – whether by explicit agreement or by silent combination or understanding with his vendee – is a *per se* violation of § 1 of the Sherman Act. (At p. 382)

While respondent and the administrative law judge contend that the quoted portion is mere dictum, since Schwinn did not appeal from the district court's ruling that territorial restrictions on resale of goods were illegal, it is difficult to avoid concluding, from a reading of the entire opinion, that the Court understood itself to be passing on the validity of the vertical territorial restraints.[14] Moreover, in the

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[14] *In holding*, for instance, that Schwinn's *customer* restrictions on resale were invalid, the Court seemed to adopt the premise that territorial restrictions on resale were invalid and reason from there to the result that the customer restraints must also fall. (Pp. 377-378)

recent case, *Federal Trade Commission* v. *The Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Supreme Court quoted from *Schwinn* (p. 379) with approval:

> "Under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. [Citations omitted] Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale." (At p. 247, n. 6)

It then noted that the Commission in *S & H* had "declined to rely on this precedent."

It would appear, as well, that the majority of lower federal courts that have considered the *Schwinn* decision have regarded it as affirming the *per se* invalidity of the vertical territorial restrictions on resale of goods challenged here.[15]

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[15] See, *e.g.*, *Cornwell Quality Tools Co.* v. *C.T.S. Co.* 446 F. 2d 825, 833 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 323 F. Supp. 1145, 1147 (E.D. Pa. 1971), *aff'd per curiam*, 461 F. 2d 1093 (3d Cir. 1972); *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321, 1327 (E.D. N.Y. 1970), *aff'd*, 451 F. 2d 593 (1971), *cert. denied*, 408 U.S. 922; *United States* v. *Glaxo Group Ltd.*, 302 F. Supp. 1, 8-9 (D.D. C. 1969); *Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711, 720, n. 4 (S.D. N.Y.), *aff'd*, 417 F. 2d 621 (1969); *Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F. 2d 21, 28, (9th Cir.), *cert. denied*, 403 U.S. 906 (1971); *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F. 2d 1080, 1085 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Tripoli Co.* v. *Wella Corp.*, 425 F. 2d 932, 936 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970); *United States* v. *Arnold, Schwinn & Co.*, 5 CCH *Trade Reg. Rep.* ¶73, 369 at 92,049 (N.D. Ill. May 1, 1972); *Ansul Co.* v. *Uniroyal, Inc.*, 306 F. Supp. 541, 559 (S.D. N.Y. 1969), *modified* 448 F. 2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); *Sherman* v. *Weber Dental Mfg. Co.*, 285 F. Supp. 114, 116 (E.D. Pa. 1968); *Warriner Hermetics,*

While it is thus difficult to resist the conclusion that the challenged restrictions are illegal *per se*, it is hardly necessary, given the aggregation of trade restraints present in this case, for the Commission to reach this proposition urged by complaint counsel. As the Court in *Schwinn* recognized, whatever the status of vertical restrictions unaccompanied by price-fixing, the presence of price-fixing as part and parcel of a system of territorial restrictions renders the entire package illegal *per se*. See *United States* v. *Arnold, Schwinn & Co., supra; Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951); *Lenox, Inc.*, 73 F.T.C. 605 (1968), *aff'd*, 417 F. 2d 126 (2d Cir. 1969); *Cf. United States* v. *Bausch & Lomb Co.*, 321 U.S. 707 (1944).

In evaluating the reasonableness of Schwinn's vertical restraints upon distributors to whom it had merely *consigned* rather than resold its products, the Supreme Court noted:

> We do not suggest that the unilateral adoption by a single manufacturer of an agency or consignment pattern and the Schwinn type of restrictive distribution system would be justified in any and all circumstances by the presence of the competition of mass merchandisers and by the demonstrated need of the franchise system to meet the competition. But certainly, in such circumstances, the vertically imposed distribution restraints – *absent* price fixing and in the presence of adequate sources of alternative products to meet the needs of the unfranchised – may not be held to be *per se* violations of the Sherman Act. (At p. 381)

In this case, of course, there is no agency or consignment agreement, and thus *Schwinn* can hardly be used to justify a

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[15](Continued)

Inc. v. *Copeland Refrigeration Corp.*, 463 F. 2d 1002, 1011 (5th Cir. 1972); *Lepore* v. *New York News, Inc.*, 346 F. Supp. 755, 761 (S.D. N.Y. 1972).

This list is far from exhaustive. While not all of the preceding cases have *held* that vertically imposed exclusive territories are illegal *per se*, the judges in all seem to have assumed that the Court in *Schwinn* did so hold.

rule of reason approach to the territorial restraints, contrary to the administrative law judge's understanding. The point is simply that respondent's use of price fixing in combination with its restriction of territories renders that entire distributional scheme illegal *per se* without regard to the legality or illegality of the territories considered alone.

It has been argued by many that imposition of limited territories by a manufacturer on its distributors may, in certain circumstances, serve various useful, pro-competitive functions. A failing firm, or an aspiring entrant, it is said, may be enabled by the right to guarantee exclusive territories, to attract the distributors and distributional capital necessary to remain or become a viable competitor in a market. See *White Motor Company* v. *United States*, 372 U.S. 253 (1963); *Snap-On Tool Corp.* v. *Federal Trade Commission*, 321 F. 2d 825 (7th Cir. 1963); *Sandura Co.* v. *Federal Trade Commission*, 339 F. 2d 847 (6th Cir. 1964).

Where the manufacturer seeking to impose vertical restraints lacks appreciable market power, it is argued that the damage to intra-brand competition resulting from the vertical restraints may be outweighed by the impetus to inter-brand competition resulting from strengthening of the failing or entering firm as a competitive factor in the market. Without reaching any final conclusion as to the economic validity of this argument, or the remaining legal vitality of such pre-*Schwinn* cases as *Snap-On Tool Corp.* and *Sandura Co.*, *supra.*, which implicitly adopted it, we would only observe that the argument's premises are belied by the situation in which the firm imposing the territorial restrictions also engages in a widespread program of price-fixing. The failing firm or the battling newcomer, facing stiff inter-brand competition and lacking market power, would no doubt find it unnecessary to limit the prices its distributors could charge retailers, and fruitless to shore-up the prices charged by distributors and retailers alike. The forces of the alleged vigorous inter-brand competition would operate more effectively than any conspiracy to limit the prices a distributor with a guaranteed intra-brand monopoly could charge retailers, while similarly preventing the retail outlet from successfully

raising prices no matter what resale price the manufacturer might seek to impose by way of conspiracy with its distributors. It is where the manufacturer of a branded item possesses substantial market power – the power to set prices irrespective of inter-brand competition – that vertical territorial restrictions are especially pernicious, for they eliminate the possibility of intra-brand competition which in an imperfect market is a critical supplement to competition between and among different brands. While the presence of price-fixing by the manufacturer is clearly not indispensable to a showing that a scheme of territorial restrictions is illegal, that presence is clearly strong grounds for presuming that the most injurious effects of vertical territorial divisions may be operative, and, therefore, for holding the entire arrangement of territories with price fixing illegal *per se*.[16] The Commission so holds.

V. Exclusive Draught Policy

Although draught beer sales constitute only a small fraction of total beer sales, draught beer sales help to increase packaged beer sales. In the words of one Coors distributor:

> "The function of the keg beer is to get customers to consume the product and I feel that draft beer is one of

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[16]It is, of course, also clear from the record that we are not dealing in this case with an aspiring newcomer or a failing firm. Coors is the market leader in ten of the eleven states in which it sells, dwarfing in market share the so-called national brewers. The unique character and quality of the product was constantly stressed throughout the proceedings, and testimony indicated that the company maintained a waiting list of several thousand potential distributors of its product, ready to take the place of such of its 166 independent distributors as might be inclined to pull out. (Tr. 2863) Respondent argues that without the guarantee of an exclusive territory it could not induce distributors to market its product. This contention seems a bit strained in view of the company's retained contractual right to restrict a given territory or add additional distributors to it upon ten days' notice to the existing distributor, and its right to terminate any distributor with 30 days' notice and without cause. (CX 351, 352)

the most important areas where you can get an image going for yourself, get market penetration stabilized a little more and get people consuming your beer. If it's good beer they'll take home your packages." (Tr. 432)

Evidence was presented at the trial to demonstrate that in a number of cases Coors representatives engaged in the practice, in combination with distributors, of seeking to induce retail outlets to eliminate rival brands of light draught beer by threatening to terminate the supply of Coors to outlets which would not, after a period of 30 days (or in certain cases, 60 to 90), eliminate the competing draught beer.

William K. Coors himself testified that exclusive draught accounts were favored and considered "desirable" by the Adolph Coors Company. (Tr. 2885) Of 2198 Coors draught accounts in a four state area (California, Colorado, Kansas, and Texas) in 1970, 92.1% were exclusive Coors' accounts and 7.9% were split. (CX 2188)[17]

It was acknowledged by a representative of Coors that a 30-day split policy is frequently used by Coors distributors in dealing with split accounts. (Tr. 2144-45) While respondent denies that it has a "policy" of imposing exclusivity on its

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[17]Respondent argues (RB 52) that CX 2188, a tabulation prepared by respondent and relied on by complaint counsel, shows that in the period 1965-1970 the number of split draught accounts in the three state area of California, Colorado and Kansas showed an absolute increase. This is true; however, a tabulation also reveals that the number of split draught accounts expressed as a *percentage* of total Coors draught accounts declined in the same period for the combined three state area. And in Texas, for which figures are first available for 1966, the number of split accounts declined from 23 out of 84 (27.4%) in 1966 to 22 out of *300* (7.6%) in 1970. Moreover, the cited statistics do not indicate how many accounts listed as "split draught" were split pursuant to a 30-day split policy. In any event, evidence of the existence of split accounts in certain areas and at particular times does not negate evidence of efforts and conspiracies to eliminate such accounts.

distributors' retail draught accounts, evidence was presented to indicate that in many instances representatives of the company urged, instructed and combined with distributors to eliminate split draught accounts. (Tr. 1524-25, 1491-92, 612-13; CX 25-26A, 162, 172-74, 270, 283, 287, 298, 321, 868-69, 872)

Glen Carskaddon, a former Coors distributor testified as follows:

Q Did you ever discuss Blitz split accounts versus exclusive accounts with your sales representatives?

A Yes.

Q With whom did you discuss this?

A All of the representatives who called on us, they wanted exclusive draft accounts.

Q What did they tell you about exclusive accounts? Did they give you any instructions? What were you supposed to do?

A If they came in, the beer, we could split for a short period of time, and then, if they didn't let the other beer go, that we would pull out.

Q You went to the retailer?

A Yes.

Q And what did you tell the retailer when you offered them Coors?

A We said we would like for them to go exclusive, "We are out selling this other brand, and we think it would be better for you if you would just go to our brand."

Q Did you put a time limit on the time Coors was –

A (Interposing) Ordinarily, it was 30 days.

Q And at the end of the 30 days, if he didn't go exclusive, what would you do?

A We wouldn't deliver beer to them.

Q Was this at the instruction of the sales representative?

A Yes. (Tr. 1491-92)

The record is replete with evidence of discussions and agreements between respondent's representatives and distributors concerning elimination of rival draught accounts.

In CX 25 the Coors representative reports that in a meeting with Zeb Pearce and Sons "We discussed and agreed upon . . . A firm policy will be instituted on split accounts." In CX 26A the Coors representative reports that a 30-day split policy is being followed by Zeb Pearce and Sons.

In CX 321 the Coors representative reports that "Scotty is . . . seeing our point of view on split draught accounts and is trying to eliminate them, and says he will not take on any more."

In addition to visits to distributors, there was evidence adduced that Coors representatives would also visit retailers to explain the Coors position on split accounts and to inform the retailer that the Company wanted only exclusive accounts. (CX 173A & B, 81, 126, 253) If the retailer refuses to remove the competitive brand of draught beer, delivery of Coors draught beer is discontinued. (CX 126, 271, 604; Tr. 1492)

In at least some cases, the efforts of Coors sales representatives to implement a 30-day split policy had the desired result of eliminating competing brands. In CX 172 the sales representative reports concerning the Amarillo, Texas, market that the "plan for exclusive draft accts." was discussed and that "the plans [sic, plan] for the future is to concentrate and try to get exclusive Coors accts." In CX 173 the sales

representative reports on a meeting with the Amarillo distributor:

> "Monday we held a meeting to decide on our approach to the split draft accounts in the market . . . . Our approach was to be to have the accounts take 30 days to decide just what brand draft they would prefer to feature."

The sales representative then personally accompanied the distributor on numerous retail calls to inform the accounts of the Coors policy requiring exclusive draught. (CX 173A & B)

In CX 174 the results of these efforts in the Amarillo market are reported:

> "Number of Coors draught exclusive – 54 – split accounts – none."

In attempting to bolster his conclusion that Coors had no policy of encouraging exclusive accounts, the administrative law judge adopted respondent's proposed finding that:

> "Almost every witness that testified on the subject of split accounts stated that they had no policy against split accounts and in fact accounts were split in their territory . . . ." (I.D. 137)

The former portion of this assertion is simply not borne out by an examination of the testimony relied upon. While many distributors did indeed service split accounts, at least two of the twelve distributors whose testimony is cited in support of the proposition did state they had a policy against split accounts (Tr. 1848, 1900), and only a few stated explicitly that they did not have such a policy. Moreover, the testimony of certain of these witnesses is belied by documentary evidence concerning their efforts to eliminate split accounts. (Compare Tr. 609 with CX 321; Tr. 413 with CX 77, 81).

In any event, the fact that Coors representatives may not have contrived with all distributors to eliminate split accounts

simply does not negate the fact, demonstrated by the preponderance of the evidence on the record, that in many instances Coors representatives did combine with distributors in efforts to eliminate competitive brands from draught accounts. Whether or not this should be characterized as a "policy" of the company, it was obviously a widespread "practice," and a practice that must be halted.

While respondent endeavored to present some justification for its requirement of exclusive draught accounts (presumably as an alternative defense to its denial of having required such accounts), it does not fundamentally dispute complaint counsel's position that such an endeavor to foreclose competitors from marketing outlets is an unfair method of competition in violation of the Federal Trade Commission Act.

In *Federal Trade Commission* v. *Brown Shoe*, 384 U.S. 316 (1966), the Supreme Court recognized that a program by a major manufacturer which required retailers to limit trade with the manufacturer's competitors in order to receive the manufacturer's goods "obviously conflicts with the central policy of both §1 of the Sherman Act and §3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market." (p. 321) Whereas *Brown Shoe* was only the second largest manufacturer in its market, Coors ranks first in sales in 10 of the 11 states in which it markets beer. It requires little imagination to envision the anticompetitive potential of efforts to make the draught-outlet choose between the number one brewer in the market and products of less-established competitors. Particularly in a market, such as that for beer, threatened by diminished competition and increased concentration, the dominant factor cannot be allowed to conspire with its distributors and retailers to foreclose competitors from outlets through which they might build themselves into a position of competitive equality. See also, *Mytinger & Casselberry, Inc.* v. *Federal Trade Commission*, 301 F. 2d 534 (D.C. Cir. 1962).

For the above reasons we find that respondent has combined with its distributors in the practice of encouraging

and coercing retail accounts to sell Coors draught beer to the exclusion of light draught beer competitors. We further conclude that such a practice is an unfair method of competition in violation of §5 of the Federal Trade Commission Act.

VI. Refusal to Sell to Central Warehouse Accounts.

Central warehousing involves the purchase by the warehouser of beer directly from a brewer or distributor, for delivery into the purchaser's warehouse. Subsequently, redelivery of the beer is made in the warehouser's own trucks to the warehouser's retail outlets. Warehousers may themselves be retailers (such as large chain supermarkets like Lucky Stores and Safeway), who buy for redelivery to their own outlets, or independents (such as Beverage Distributors, Inc.) who buy for redelivery to non-affiliated outlets, or retailer warehouses.

Prior to 1964, Coors had permitted sales to central warehouse accounts, but, in 1964, the company "made the determination that a central warehousing program *would no longer be permitted.*" (CX 2027A) In a letter dated March 11. 1964, to distributors, the company announced that "it is the decision of the Company that this type of *warehousing shall be discontinued as of April 1, 1964.*" (CS 2027C)

Even prior to this, there is evidence that Coors had in effect precluded its Reno, Nevada, distributor from selling to a central warehouse account by instructing it to sell to the account at the same price offered to retailers. (Tr. 1184-89; CX 2053) Presumably the price concession previously offered voluntarily by the Reno distributor was justified by lower costs in providing large quantities to a single location.

Pursuant to the 1964 policy decision, distributors who had been selling to central warehouse customers were advised by Coors to terminate the relationship.

> "Two [Coors] distributors, Zeb Pearce and Sons in Phoenix, Arizona, and O.K. Distributors, Inc., Reno, Nevada, apparently at one time did, in fact, sell to Beverage Distributors, Inc., on a central warehousing

basis. Effective April 1, 1964, the Adolph Coors Company discontinued these type of sales and so advised its distributors.

"In conjunction with this decision on behalf of the Company, the distributors were advised that they should themselves terminate this relationship with the buyers, the main one being, I think, Beverage Distributors, Inc." (CX 2028, letter from respondent's counsel to the Commission, dated August 20, 1965.)

The reasons for Coors' imposition of restraints on sales to central warehouse accounts were disputed at the trial. Respondent contends that the prohibition on central warehousing is necessary to maintain the quality of Coors beer, that central warehouse facilities often do not provide adequate refrigeration and rotation of stocks.

At the same time, there was substantial evidence to demonstrate that Coors acted, at least in part, in an effort to satisfy distributors who viewed central warehousing as a threat to the integrity of their illegally conferred territorial monopolies. (CX 2052; Tr. 1233; CX 2446)

The threat posed by central warehousing to the illegal territorial monopoly is apparent. The central warehouser purchases a large quantity of beer at a single location, and may subsequently resell or redistribute some of that beer to retail outlets outside the territory of the distributor who has supplied it to him. The result is to bring the distributor in the outside territory into effective competition with the distributor in the central warehouse's territory, in contravention of the entire purpose of the territorial restrictions, though quite possibly in aid of competition and lower prices to consumers.

Witnesses for complaint counsel testified that substantial cost savings might be realized from the efficiencies of centralized methods of distribution, savings which would subsequently be passed on to the consumer (absent legal or illegal resale price maintenance). (Tr. 1284-85, 1202, 1236, 1630-33; CX 2062-63) Coors contends, to the contrary, that such

efficiencies are chimerical, and countervailed in any event by the substantial threats to quality control posed by central warehousing. (RB 46-48 and citations therein)

Clearly the comparative advantages and disadvantages of central warehouse distribution of beer cannot be resolved definitively from the record. Rather, resolution should be left to the free, unimpeded play of market forces, and the respective, independently exercised judgments of the relevant units of distribution. The law makes clear that the customers to whom a distributor may sell should be a matter of his own choice, and not subject to dictation by, or agreement with, the manufacturer. See *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967):

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict the territory or persons to whom the product may be transferred – whether by explicit agreement or by silent combination or understanding with his vendee – is a *per se* violation of §1 of the Sherman Act. (p. 382)

While it is arguable that the legality of territorial restrictions on resale was not strictly at issue in *Schwinn*, the company not having appealed from the District Court's finding of illegality, the legality of customer restrictions was appealed.

Only the narrowest exceptions to the *Schwinn* rule prohibiting customer restrictions on resale have been recognized by lower courts.[18] While Coors alleges that its customer restrictions are necessary for "quality control," it has failed to demonstrate why substantially the same protections could not be achieved by policies requiring the distributor to take responsibility for ensuring that all sub-distributors rotate supplies and maintain the necessary refrigeration, rather than by categorically obliterating the freedom of its distributors to

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[18]See *Tripoli Co.* v. *Wella Corp.*, 425 F. 2d 932 (3rd Cir. 1970), *cert. denied*, 400 U.S. 831 (1970) (customer restriction imposed to limit danger of *physical injury* was reasonable).

deal with a class of sub-distributors who are presumed to be incapable of maintaining the requisite quality. Evidence at the trial was at best inconclusive as to the capacity or lack thereof of central warehouse distributors to maintain the quality standards desired by Coors. Whether even an absolute necessity to maintain quality standards would, under the law, justify imposition of restraints on resale to an entire class of customers must be counted as at best uncertain. It is hardly necessary for us to determine that issue here, however, where there is no evidence that a policy less restrictive than a categorical customer restriction would not be wholly adequate.

The use of central warehouse distribution at least holds out the possibility of cost savings to consumers. While Coors characterizes its policy as not a restriction on resale to customers, but a restriction on the manner in which customers will be sold, this is clearly not the case. For one thing, at least certain central warehouse distributors are independent of the retail outlets to which they deliver. Prohibition of central warehouse sales, or, alternatively, a requirement that prices to such outlets must equal the prices to retail outlets, irrespective of cost differences, effectively eliminates these customers from the market. With respect to prohibition of sales to retailer-owned warehouses (when sales direct to the retail outlets themselves are permitted), such a categorical prohibition is still a substantial restraint on the capacity of the distributor to resell to whomever he chooses, and threatens the same anticompetitive results as other illegal restraints on alienation. We thus find both practices to be unfair methods of competition, in violation of §5 of the Federal Trade Commission Act.

The order prescribed to eliminate this abuse does not prevent Coors from requiring maintenance of requisite standards of care on the part of its distributors and sub-distributors, nor does it preclude each individual distributor from deciding in its own discretion whether or not to resell beer purchased from Coors to a central warehouse, or from deciding what price to the warehouse is appropriate. It merely

enjoins Coors from requiring its distributors, and agreeing with them, to refrain from selling to central warehouse accounts *per se*.

VII. Termination and Non-Assignment Provisions

Pargraph 4 of the Coors Distributor's Agreement provides in relevant part:

> "4. This agreement and any supplements now or hereafter effective (whether fixing prices and terms to the Distributor or otherwise) may be cancelled in entirety at any time by the Company for any breach by the Distributor on five (5) days' written notice to the Distributor. This agreement and such supplements may be cancelled by either party without cause upon the giving of notice to that effect to the other party, in which event termination shall become effective thirty (30) days after delivery or the mailing of the written notice of cancellation, whichever first occurs . . . ." (CX 351C, 352C)

The distributor's contract enjoins the distributor to conduct his business "in a manner satisfactory to the company" (CX 352B, 353B), which is interpreted by the company to mean that the distributor must follow both written and unwritten policies and understandings. (Tr. 274) Virtually unlimited basis for termination even "with cause" would thus seem to exist.

There can be no doubt that the short-term termination provisions, whether or not in combination with a limitation on assignment of the franchise (and such a limititation is imposed by Coors[19]) constitute a potent weapon with which the manufacturer may enforce compliance by his distributors with his demands – whether reasonable and efficiency-producting, or unreasonable and anticompetitive. In a case without the record evidence available here, the Supreme Court recognized the self-evident proposition that there was "inherent coercion" in franchise agreements between a

[19] Admitted in Answer, p. 5.

dominant franchisor and dependent franchisees containing short termination provisions. *Federal Trade Commission* v. *Texaco, Inc.*, 393 U.S. 223, 229 (1968). Respondent's own submission indicates that beer distributors in general fear termination with little or no warning, a fear that stems in part from "the use by brewers, especially by their field representatives, of threats to terminate the relationship." (RX 1079, p. 30)

Distributors of Coors beer are required to pay no franchise fee for the simple privilege of distributing it, but the record indicates that many have made substantial capital investments in facilities for distributing the product[20], and it hardly requires the wealth of record evidence available in this case to envision the coercive impact flowing from Coors' capacity to render such an investment of sharply diminished value in a short period of time and for whatever reason it chooses. While the record indicates only three actual terminations by Coors during the past fifteen years, it does contain evidence of distributorship sales consummated under the actual or implied threat of termination.

As might be expected, evidence as to the precise reasons for forced terminations or coerced sales is conflicting. A number of witnesses for the Commission testified that they were forced out of distributing Coors as a result of refusal to engage in a variety of anticompetitive practices – adherence to territorial boundaries, price-fixing, and distribution of Coors beer to the exclusion of other brands. Coors contended, to the contrary, that all terminations and forced sales were prompted by deficiencies in distributor performance of legitimate requirements. The administrative law judge generally accepted Coors' position.

Only one terminated dealer, Mr. John Hemphill, testified at the trial. He testified that in his view the reasons for his

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[20]Of those distributors who testified to the matter, the smallest investment was $120,000 (Tr. 637) the largest was $2,000,000. (Tr. 1774) (See also Tr. 445, 562, 689, 1812, 1837, 1870, 1889, 1923, 1954.)

termination had been disputes with Coors over his pricing policies and extra-territorial sales. (Tr. 1411) The judge concluded, from the fact that Mr. Hemphill had sued Coors in a private action for unlawfully terminating him, and on general grounds of demeanor and the nature of his answers, that Mr. Hemphill's replies could not be given great weight.[21] Contemporaneous documents prepared by respondent's own representatives do tend to confirm Mr. Hemphill's contentions regarding disputes with Coors concerning his pricing policies. (Compare CX 482 and 486 with Tr. 1382-83 and 1387-89) These same documents, of course, note other alleged deficiencies in Mr. Hemphill's distributorship, which Coors claims were the ultimate basis for his termination, and which Mr. Hemphill denied.

The same evidentiary pattern is apparent in the case of distributors who sold their franchises under threat of termination.

Dixon, a Coors distributor, claimed that he was forced to sell his franchise because of disagreements over pricing and extra-territorial sales. (Tr. 1582) A Coors representative reported of a conversation with Dixon:

> "Discussed adherence to territory [sic] boundaries. Mr. Dixon was shown two letters that indicated that the Del Rio distributorship had been selling beer outside of its territory [sic]. He was advised that we had a capacity to take [care] of our present area only and could not tolerate beer going out of boundary [sic]. He was advised that if he could not control his area then we would have to find someone who could." (CX 250)

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[21] As noted previously, we find it odd that the judge should use Mr. Hemphill's litigation with Coors as a basis for disbelieving *his* testimony regarding the termination, but not as a basis for discounting the reports of Coors representatives concerning the termination, or the assertions of Coors representatives that no terminations had been threatened for reasons of failure to commit acts challenged by the Commission's complaint. It seems apparent to us that the judge did not give fair consideration to Mr. Hemphill's claims. Cf. *Golden Grain Macaroni Company*, Docket No. 8737 (1971), p. 17 slip opinion.

And later:

> "due to Coors recently being shipped to the Laredo Air Force base and Laughlin Air Base in Del Rio I advised Mr. Dixon we should not allow Coors to leave our distribution area. To make this clear to Mr. Dixon, he was advised any distributorship shipping beer out of his area could expect to go to Golden to explain why he could not cooperate with us. Mr. Dixon assured me he would sell no beer outside of his area." (CX 251)

Dixon also recounted being reprimanded by a Coors representative for continuing sales to discount retail outlets in his area. (Tr. 1565-72) Dixon was eventually sent a letter threatening termination if he did not improve his operation. Dixon then arranged a sale of his franchise. His sales had been improving and he contends that his retail accounts received good service. (Tr. 1562-63, 1580-82) Coors contends that Dixon's performance was inadequate and that this was the reason for his termination.

There is also evidence that threats of termination were used in an effort to force distributors to handle Coors beer exclusively.[22] Distributors Carskaddon and Tinetti testified that Coors' desire for an exclusive distributorship (both distributed Olympia as well) led to pressure for them to sell out. (Tr. 1492-1500, 1526-32; CX 690-91, 789-90) Coors contends, and the administrative law judge concluded that these distributorships had constant problems in the operation and management of their distributorships (I.D. 125), and that these, rather than any desire for exclusive distributorships *per se*, led to the pressure for selling out. There is, however, corroborating documentary evidence to the effect that Coors

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[22]Respondent appears to concede the iliegality of this practice, though denying that it engaged in it. Given Coors' dominant market position and the large market share held by its distributors, a practice whose effect would inevitably be to foreclose competing brands from access to such distributional outlets may have serious anticompetitive consequences. See *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316 (1966).

in other instances discouraged its distributors from handling competing brands and pushed them to handle Coors exclusively. (CX 626, 716A & B, 718B, 719B, 720A, 721A & B, 723-25, 748-49, 796-97) We conclude, based on our review of the evidence, that threats of termination were employed by agents of respondent at least in part in order to achieve this anticompetitive result, and others, including adherence to territorial boundaries and maintenance of prices. (See also pp. 10-12, 24 infra.)

Whether or not actual terminations of Coors distributors, or sales forced by threat of termination can be ascribed entirely, solely and umambiguously to the failure of the terminated or coerced distributor to participate in an antitrust violation, it is abundantly clear from the record in this case that Coors representatives have used the explicit or implicit threat of speedy termination in often successful efforts to force the acquiescence of its distributors in anticompetitive behavior.[23]

In urging us to find the use of these termination provisions an unfair trade practice, complaint counsel and intervenor, the Small Business Administration, rely on two not wholly consistent rationales.

On the one hand it is urged that with the short-term termination provision, in combination with limitations on assignability of the franchise, is inherently unfair to the franchisee, depriving each of the opportunity to realize the full value of his investment and labors *irrespective of any particular anticompetitive scheme of which the termination provision may be part*, or which it may be used to facilitate. The SBA cites legal precedent, developed in the context of damage suits for franchise terminations, holding that standards of fairness, reasonableness and good faith must be read into

[23]Indeed, from a legal standpoint, it may be the threat of speedy termination, rather than the simple act itself that is most pernicious. While the *Colgate* doctrine would seem to permit the manufacturer to deal with whomever he pleases, *it does not permit him to use repeated threats to terminate dealings in order to forge agreements with distributors to engage in anticompetitive practices.* (Cf. CX 501A)

any termination attempted under a franchise agreement involving substantial investment by the franchisee. See, *e.g.*, *Gaines W. Harrison & Sons, Inc.* v. *J. I. Case Co., Inc.*, 180 F. Supp. 243, 247 (E.D.S.C. 1960); *J. C. Millett Co.* v. *Park & Tilford Distillers Corp.*, 123 F. Supp. 484, 493 (N.D. Cal. 1954); *J. R. Watkins Co.* v. *Rich*, 254 Mich. 82, 235 N.W. 845 (Mich. Sup. Ct. 1931). At least one case has held that even in the face of express termination provisions in an agreement, the court will impose its own where the express ones are unfair, and numerous state and federal laws impose requirements of fairness and good faith in the termination of a manufacturer's franchisees or distributors. See *Shell Oil Co.* v. *Marinello*, 5 CCH Trade Reg. Rep. ¶74, 178, p. 92, 881 (N.J. Sup. Ct. 1972); 15 U.S.C. §§1221-1225; *Conn. Gen. Stat.* 1971, §30-17, *Burns Ind. Stat. Ann.* 1970, §12-451a; *Gen. Stat. of N.C.*, §18-69.2; *Code of Va.* 1971, §4-80.2; *W. Va. Code* 1971, §11-16-13b.

The rationale outlined above regards the distributor to some extent as a *consumer* of the products of his manufacturer, a consumer who must be protected from the oppressive effects of a particular clause of his contract that threatens to destroy its value. This argument is far from uncompelling in the circumstances of this case. A Coors distributor who has invested several hundreds of thousands of dollars to develop his business may, in the space of five days for ill-defined "cause" or 30 days for no reason whatsoever, be deprived of his source of beer and thereby of much of the value of his investment. Given Coors' dominant market position, and the distinctiveness of its brand name, it is unlikely that a distributor will be able to find an adequate substitute, and whatever forced sale he may be able to make (with, of course, the required consent of Coors) can be at best but partial compensation for this loss. It is hardly a complete reply to the SBA's position to argue that the distributor, when he signs his franchise agreement, is "aware" of the short-term termination provisions.

While we must thus remark that we are hardly impressed with the reasonableness or fairness of the challenged termination provisions, on their face, it is not necessary that we

consider from the facts of this case whether *absent any specific anticompetitive uses*, the inclusion of such provisions, in the distributor's agreement, would be an unfair practice. For in this case it is abundantly clear that the termination provisions have been used in efforts to achieve all manner of anticompetitive arrangements between Coors and its distributors. The short-term termination provisions here under attack have been part and parcel of the aggregation of trade restraints in which respondent has engaged, and must fall with them. We find the use of these provisions under the circumstances of this case to constitute an unfair method of competition.

To be sure, a manufacturer's ability to terminate and threaten to terminate his poorly performing distributors with dispatch may be, under normal circumstances, critical to the efficient conduct of his business, and absent abuse of that power, should be disturbed with great reluctance. The termination of a dealer who has violated reasonable requirements of a manufacturer may well serve the interests of competition rather than subverting them.[24] But when termination provisions are abused for the purpose of coercing anticompetitive behavior, remedial action is clearly required.

In seeking to fashion an appropriate remedy, the Commission's design is to limit the value of the short-term termination provisions as a weapon to be used by Coors' agents for coercing compliance with anticompetitive demands

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[24]It is, indeed, this consideration in part that leads us to eschew the rationale propounded by the Small Business Administration. Where a termination clause is not used to foment anticompetitive behavior, there remain two competing interests at stake – (1) that of the manufacturer in conducting his business as he thinks is most efficient, and (2) that of fairness to the distributor, who has made a substantial investment in his franchise, and should be protected even at some cost to "efficiency" from loss of his investment. A balancing of these interests alone should only be attempted with a more extensive record than is available here, and perhaps indeed in the context of a rule-making proceeding in which the implications for a wide range of businesses can be assessed.

by threatening distributors with substantial economic loss, or lengthy litigation, if they fail to comply with such demands. It is clearly insufficient simply to order that respondent not terminate or threaten to terminate its distributors because of their refusal to engage in the anticompetitive activities revealed and condemned in this opinion. As the record demonstrates, it is difficult in many cases to ascribe precise and exclusive reasons to a particular termination, or to a particular threat of termination. While the record reveals a helpful lack of subtlety on the part of certain of respondent's representatives in their use of termination threats – employing them hard on the heels of criticisms of distributor refusals to engage in anticompetitive behavior – there is clearly no need that such directness be used to accomplish the same result in the future. An order that merely prohibits the use of termination threats to coerce anticompetitive behavior would be extremely difficult to enforce and would therefore do little to encourage the independent choice by distributors in matters of pricing and customer selection that is necessary to remedy the abuses found in the record.

The requisite independence of Coors' distributors from coercion to act anticompetitively can only be fostered, we believe, by rendering more equitable the terms upon which they may be terminated by the brewery, and providing a more realistic remedy for unlawful termination than a lengthy and uncertain court battle.

The Commission's order thus provides in essence for the following:

(1) Termination for "cause" – defined as a material breach of one or more contract provisions relevant to the effective performance of the franchise may be made following 60 days' notice to the distributor and an opportunity for arbitration to determine whether such cause exists.

(2) Termination without cause – defined as any good faith termination (but *not* termination for reason of failure to engage in anticompetitive activity) may be made upon 180 days' notice and an opportunity for arbitration to determine

that termination is being made in good faith and not for a distributor's noncompliance with anticompetitive orders. In both cases, approval of a purchaser of the terminated distributor's franchise must not be unreasonably withheld.

The intent of the remedy proposed is to provide greater assurance to a distributor who may find himself the subject of company pressure to engage in anticompetitive acts that he may resist such pressure without the threat of substantial economic hardship, while at the same time not unduly hampering Coors' capacity to terminate poorly performing distributors.

So long as respondent can cut off its distributor "without cause" there is always some possibility that it will exercise the power, and threaten to exercise the power to anticompetitive ends. The coercive impact of such threats can, we believe, be limited by lengthening the period of notice, and requiring reasonable exercise of the power to approve franchise purchasers, thereby increasing the likelihood that a satisfactorily performing distributor who would be inclined to resist improper pressure will ultimately be able to realize the full value of his franchise if he chooses to resist the pressure, and is terminated for doing so. In addition, the requirement that termination without cause nonetheless be made in "good faith" and that the existence of such "good faith" be subject to determination by an arbitrator, should provide some assurance that a distributor will not be terminated for anticompetitive reasons.[25]

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[25]We recognize that so long as termination without cause is not banned outright, the danger will always exist that a termination for improper reasons will be successfully disguised in a torrent of legitimate business reasons. All we can say is that a distributor who believes he has been threatened with termination for anticompetitive reasons will be more inclined to take the chance of proving his case if the forum in which he can do so is an inexpensive arbitration prior to termination rather than in court after his source of livelihood has been eliminated. Similarly, the possibility that Coors might be in violation of a Commission order for threatening termination is likely to be of limited comfort to the threatened distributor.

As regards termination "with cause," the Commission believes that Coors must not be deprived of its power to terminate distributors for substantial contract violations with relative expedition. Thus only 60 days' notice is required, in addition to arbitration. If Coors can demonstrate at an arbitration proceeding that substantial contract violations have occurred, the possibility that termination has been ordered or threatened for illegitimate reasons would seem thereby diminished. While this does not eliminate the possibility of Coors cloaking anticompetitive coercion in charges of contract violations, the distributor subject to such charges is nonetheless provided with assurance that Coors must, if he chooses in good faith, prove them to an arbitrator prior to the effective date of the termination. This should provide the requisite encouragement for a distributor who has performed reasonably to resist coercion, while permitting the company to eliminate those who have violated their obligations.[26]

While the provisions of the Commission's order, as outlined hereinabove, do necessarily limit Coors' freedom to contract for the terms on which it may terminate its distributors, that limitation is necessary as indicated because of Coors' anticompetitive abuse of the termination provisions which it negotiated in the past.[27] Moreover, while as noted, our relief results from the illegal use of contract provisions, we hardly think it inequitable that Coors should have to provide its distributors, who may have invested hundreds of thousands of dollars to merchandise its product, with a modicum of fairness and due process before it cuts them off.

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[26] Along these lines, the order provides that the distributor shall pay for the costs of arbitration in the event it is shown he has sought it in bad faith.

[27] The administrative law judge concluded without legal support that the Commission's proposed remedies with respect to termination, exclusive territories, and dealings with central warehouse accounts if implemented would violate petitioner's Fifth Amendment rights. We reject this contention out of hand. It is fundamental that a contract provision which contravenes the Constitution or a valid statute enacted thereunder cannot be valid. *Evert* v. *Bluejacket*, 259 U.S. 129 (1922).

For the foregoing reasons, the appeal of complaint counsel is granted as provided hereinabove. The initial decision of the administrative law judge will be vacated and set aside, and an appropriate order will be entered.

Commissioner Thompson did not participate.

July 24, 1973

APPENDIX C

Filed: September 15, 1972

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of ADOLPH COORS COMPANY, a corporation.	DOCKET NO. 8845

INITIAL DECISION

By Walter R. Johnson, Administrative Law Judge.

For the Commission:

Alfred W. Cortese, Jr.,
Assistant Executive Director.

Ernest G. Barnes,
Assistant Director,
Bureau of Competition.

Anthony Low Joseph,

Thomas V. Vakerics,
Counsel Supporting
The Complaint.

Bradley, Campbell & Carney
By Leo N. Bradley,
Earl K. Madsen,
Golden, Colorado,
Counsel for Respondent.

SUMMARY OF PROCEEDINGS

The Commission in a complaint issued on June 7, 1971 (mailed on June 28, 1971) charges that the respondent, Adolph Coors Company (hereinafter referred to as "Coors"), violated Section 5 of the Federal Trade Commission Act by

[Part 2, p. 987]

various acts and practices which have had the effect of restraining competition between distributors and retailers selling Coors beer and other beers in the market area in which Coors distributes its beer. The unlawful practices alleged, as summarized, are that respondent has

(1) fixed, controlled, established and maintained the prices at which its distributors and its retailers sell Coors beer;

(2) restricted the territories in which, and the customers to whom, its distributors may sell Coors beer;

(3) requires its distributors to force retailers to serve Coors draft beer exclusively, or not at all;

(4) prohibited its distributors from selling and delivering beer to central warehouse accounts;

(5) included thirty and five-day cancellation periods in all of its distributor contracts; and restrained its distributors from freely selling their distributorships to purchasers of their own choosing and at prices freely determined by the seller and the buyer.

The respondent's answer filed on August 30, 1971 is in the nature of a general denial, however, it admits that it enters into contracts with distributors which do contain clauses setting forth the sales territories of the distributors and a clause permitting cancellation for breach of the agreement on five days' notice and on thirty days' notice without cause. As affirmative defenses the respondent challenges the authority of the Commission to issue the complaint contending that it fails to state a claim for relief; that it is not engaged in commerce; that its pricing activities are limited to suggestions, that its vertically imposed territorial limitations are lawful; that it is exempt from any proceeding by operation of the Twenty-first Amendment to the Constitution of the United States; that it is entitled to protect its

trademarked products; that its conduct provided intra-brand competition; that the Commission is guilty of laches since the alleged practices have been in widespread, open and notorious use in the brewing industry for well over forty years; that the order sought by the Commission violates

[Part 2, p. 988]

the respondent's property rights; and that no distributor has ever been terminated because of an act complained of by the Commission.

Prehearing conferences were held on September 14, 1971 and January 14, 1972, at which time matters relating to the conduct of the proceeding and the time and place of hearings were discussed and resolved. Hearings were commenced on Feburary [sic] 14, 1972 at Denver, Colorado, and proceeded continuously in said City through March 14, 1972, during which time complaint counsel put in their case, calling 28 witnesses, and respondent its defense, calling 42 witnesses. There were 2971 pages of testimony taken, and approximately 3000 documents, totaling over 5000 pages, were received in evidence. On the last day of the hearings, it was ordered that complaint counsel file their proposed findings on May 12, 1972; respondent its proposed findings on May 26, 1972; and complaint counsel their reply on June 5, 1972. On May 12, 1972, the Small Business Administration filed a motion to intervene which, by order dated June 15, 1972, was allowed by the Hearing Examiner* to the extent of permitting the Administration to file a brief as amicus curiae.

GENERAL BACKGROUND STATEMENT

Respondent Adolph Coors Company is a corporation organized under the laws of the State of Colorado, with its executive office, brewery and principal place of business at Golden, Colorado (Complaint and Answer). The respondent is,

*At the time this case was tried, the presiding officer was known as a Hearing Examiner, whose title was changed to Administrative Law Judge on August 19, 1972.

as referred to in the industry, a regional brewer, and its beer is marketed through distributors in the eleven States of Oklahoma, Kansas, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Nevada, California, and a portion of Texas (Complaint and Answer). Population trends of the United States show a gravitation to this southwestern portion of America (RX 1081-1093). These are basically the same marketing areas that it has been marketing in since the end of prohibition (Tr. 2859). Adolph Coors Company will probably expand its marketing area by 1980 into the rest of Texas and then possibly into Washington, Oregon and Nebraska, but these facts aren't announced yet because, if they were, it would just create more applications for distributorships (Tr. 2915). The beer is marketed through 166 independent distributors (Tr. 2860). There is one exception to that and that is the metropolitan Denver area

[Part 2, p. 989]

wherein Coors Distributing Company is the distributor, this company being a wholly owned subsidiary of the Adolph Coors Company, and the reason for this is that it serves as a model and a research laboratory, plus giving the brewery distributorship experience (Tr. 2862; RX 170, pp. 7-8). The contracts with the distributors are written (Tr. 2862; CX 2 A-C; CX 3 A-C).

William K. Coors, called as a witness by respondent, is the present chief executive officer of the respondent (Tr. 2840). He has worked for the respondent since graduating from Princeton as a chemical engineer in 1939 (Tr. 2841). He testified that the respondent is a privately held company and can be traced back to 1873 when Adolph Coors (grandfather of William K. Coors), a 20 year old native of Germany, together with a partner named Schuler, purchased a plot of land in Golden, Colorado, with a stone building thereon where they established a brewery. In 1880, Adolph Coors bought out his partner, and respondent's brewery has remained on the same site throughout the years of its existence (Tr. 2842-2843).

Mr. Coors stated that during prohibition the Adolph Coors Company manufactured near beer and malted milk (Tr. 2843). In addition, much effort was directed toward Coors Porcelain Company during the prohibition era, which was originally started in 1887 as a glass plant to manufacture beer bottles for the brewery (Tr. 2844; RX 1155 B). Coors Porcelain Company is a totally owned subsidiary of the Adolph Coors Company and is operated by Joseph Coors, brother of William K. Coors (Tr. 2844). When prohibition finally shut the brewing industry down, there had been just prior to that time approximately 1,400 breweries operating in the United States. When prohibition ended, 1935 saw approximately 750 breweries in America that had survived and were able to get back into beer production, and this number has steadily declined to the point where there are now operating in America only about 70 breweries of any consequence (Tr. 2845). The decrease in the number of breweries has been due to the competition in the brewing industry (Tr. 2845). The failure to continually produce a high quality beer at a realistic price has caused 95% of the brewery failures since 1935.

Mr. Coors further stated that size doesn't necessarily have anything to do with the economic condition of a brewery in that some of the more successful breweries are small ones (Tr. 2900). Production of beer by the Adolph Coors Company

[Part 2, p. 990]

in 1935 amounted to 140,000 barrels (Tr. 2860). In 1948, the Adolph Coors Company was the 49th largest brewer in America with production amounting to 470,000 barrels (TX 1057 A). The Adolph Coors Company now ranks as the fourth largest brewer in America following its three major competitors, Anheuser-Busch, Schlitz and Pabst (Tr. 2852; RX 1057 S). Production of the Adolph Coors Company in 1971 amounted to 8,500,000 barrels. Sales of the Adolph Coors Company during the year 1971 were approximately $350,000,000 (Tr. 2899). Mr. Coors serves as the Chairman of the Board of Directors of the United States Brewers Association, whose 41 members comprise about 90% of the brewing capacity in America today (Tr. 2845).

He explained that the major ingredients of beer are approximately 92 per cent water, barley, a source of neutral starch, corn, rice and in some cases a converted sugar syrup and hops for flavoring (Tr. 2846); that Coors has a natural supply of remarkably pure water that underlies the land at the brewery (Tr. 2847); that 80 per cent of the hops comes from Germany, and the other 20 per cent comes from Idaho (Tr. 2847); that the German hop "... that we use has a very bland, a very fragrant flavor to it that gives our beer a characteristic that we are unable to get with domestic hops" (Tr. 2847). He further testified (Tr. 2847-2848): "The German hops do not have the bittering power that the American hop has so in addition to paying about twice as much for them, you have to use about twice as much, too.... We have our own recognized variety of brewing barley. It is called Moravian. It is grown for us by about 1,600 farmers located in specific areas in Colorado, Idaho, and this year for the first time in Wyoming.... We have our own staff of agronomists. We have been working on this barley for 25 years now, at least.... The seed is grown for us by certain certified seed growers. We receive the seed, we process the seed and we sell the seed to a grower, the farmer himself. We will not accept barley that is not grown from our seed.... We have an experimental farm in the San Luis Valley of Colorado. ... We develop various barley strains [there]. We experiment with various agronomic techniques, always trying to improve the barley, improve the growing methods, be as much help as we can be to our growers primarily to get a feel for what it costs to grow barley so that we are fair with our growers in what we pay.... American brewers use a source of neutral starch and this would be corn or rice or in some cases a manufactured sugar syrup.... We use rice.... In our opinion, rice makes a superior beer.... We use what is

[Part 2, p. 991]

referred to as short-grain rice as opposed to a long-grain rice. It comes from Sacramento and San Joaquin Valleys of California.

Mr. Coors stated that what a good distributor should do in distributing Coors beer is covered in the policy manual of the company (Tr. 2862; RX 1047 E, F and G). Summarized, a good distributor should obey all laws, be active in community affairs, know governmental agency personnel applicable to the beer industry, be active in state and local beer organizations, encourage ecology and recycling efforts, be a responsible businessman, maintain a satisfactory merchandising department, solicit the business of every retailer in his territory, fairly allocate beer during shortages, control inventory, promote all packages, have adequate refrigeration, attempt to sell refrigerated marketing concept, work against boycotting, service his territory even during strikes, have complete care and control of the product, and cooperate with manuals and bulletins published from time to time by the company.

To determine whether or not a distributor is distributing within the general framework of the policy manual, Mr. Coors stated (Tr. 2863): "The company maintains a staff of area representatives. I believe there are 35 people in this group.... Each area representative is assigned a certain number of distributors and it is his reponsibility [sic] to work with these distributors to see that the conditions of the policy manual are adhered to."

In speaking on competition, Mr. Coors said that the Coors Company competes with "every brand of beer that is sold" (Tr. 2851); and that its major competitors are Anheuser-Busch, Schlitz and Pabst. Mr. Coors does not expect that there will be more than 20 brewers in America by 1980 (Tr. 2881). If the top three brewers in America continue their present rate of growth, they will fulfill all the total beer requirements of the United States by 1985 (Tr. 2581). The competition in the beer business is "rough and ruthless" (Tr. 2853). In connection with this competition, he testified (Tr. 2853): "We [Coors Company] have one substantial disadvantage and that is our single plant location. We are today the only shipping brewery left in America. In 1971 the average barrel of our beer traveled 961 miles to its market place. This puts a freight consideration on us that our major competitors do not have with their multi-plant operations.

Somehow we have to overcome this freight disadvantage.

[Part 2, p. 992]

"There are two things we attempt to do. We attempt to minimize our marketing costs by achieving better market penetration than our competitors and to minimize our advertising costs to offset our freight disadvantage." This is evident in that Coors now markets in the same basic area that it marketed in in 1935 (Tr. 2876). Coors' advertising costs during 1971 were less than $1.00 per barrel, while the advertising costs of Anheuser-Busch or Schlitz have been "$4 and up" (Tr. 2853).

The witness explained in detail the process employed in the manufacture and packaging of the Coors beer, which he stated was an extremely technical science and took a period of 80 days, while the breweries which are competitors take only 20 days (Tr. 2855). The plant is classified as a food manufacturing plant with absolute standards of cleanliness controlled by what is called an aseptic process (Tr. 2855). The aseptic process is merely the art of deactivating microorganisms so that the beer can be microbiologically stabilized before it leaves the premises in the various packages (Tr. 2856). This is done with hermetically sealing all areas where all air is filtered and sterilized and used in conjunction with equipment designed and fabricated by the Adoiph Coors Company (Tr. 2856). The Adolph Coors Company is unique in that it fabricates most of its own equipment (Tr. 2873). Coors beer is not pasteurized anymore. The elimination of pasteurization and the conversion to the aseptic process started in 1959, and took about eight years to complete (Tr. 2856). The elimination of pasteurization is an absolute necessity for a refrigerated marketing concept. This concept must use the aseptic fill process which necessitates keeping the beer cold from the beginning (Tr. 2857). In aid to this, the entire brewery is air conditioned (Tr. 2858). No other brewer in America uses the refrigerated marketing concept (Tr. 2858). Coors beer is not stored at the brewery except for a few odds and ends with 98% of the beer coming right off the packaging lines and going in either insulated railroad cars

or refrigerated trailers for transportation to the distributors (Tr. 2858). Mr. Coors stated that "our beer is the most expensive beer made in America by a substantial margin."

The marketing department established the prices for Coors beer which is all sold at the same price to all distributors F.O.B. Golden, Colorado, and prices are communicated directly to the distributors at the time they are established (Tr. 267). The distributor selects the mode of transportation from the brewery, arranges for the

[Part 2, p. 993]

same, and pays all freight bills direct to the carrier (Tr. 262-263).

Seventy-five per cent of the beer is shipped by rail and 25% of the beer is shipped by truck (Tr. 2866). The rail cars that the Company uses are specially insulated, cushioned cars built to the Adolph Coors Company's specifications and no other brewery in the country ships in this manner (Tr. 2866). All rail cars and transportation vehicles are either insulated or refrigerated and that is a part of the Coors refrigerated marketing concept (Tr. 2866).

As to why they ship in refrigerated or insulated transportation, he said (Tr. 2866-2867): "Our beer is a very expensive beer. It is a very delicate beer. It is a very sensitive beer. If we are going to get our beer to the consumer with a maximum appeal to him in terms of flavor and drinkability, we must minimize both the time and the temperature that the beer is subjected to from the time it leaves our packaging lines until it gets to the consumer. Refrigerated marketing achieves the minimizing of the temperature. . . ."

"Through extremely tight quality control", Coors guarantees the continued production of high quality beer (Tr. 2873). Mr. Coors continued (Tr. 2873-2874): "There have been over 800 brewers go out of business since 1935. Some of them have gone out more than once. I would suspect that in 95 per cent of the cases or more that poor product is the

basic reason. They could not produce a beer of satisfactory quality at a price. . . ."

Mr. Coors states that there has been a chronic beer shortage at the Adolph Coors Company for many years (Tr. 2876). The brewery produced at over capacity during 1971 (Tr. 2912). It is impossible to supply the demand (Tr. 2884). It puts practically all of its resources into plant expansion (Tr. 2884). These shortages are dealt with by computerized calculations based upon withdrawals from the individual distributors' warehouses (Tr. 2864). This fact is further complicated in that specific beer must go to specific places in specific packages (Tr. 2865).

The Adolph Coors Company requires that both the shipper and the distributor move the beer to the consumer as fast as possible. The amount of inventory with the distributor is controlled by the Adolph Coors Company and the distributors have nothing to say about that because the Coors Company works in and out of the distributors' inventory. The responsibility

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of controlling the retail stock level of both the distributor and retail outlet is the responsibility of the distributor so that the time spent in each place is an absolute minimum (Tr. 2874).

Mr. Coors stated that fifty per cent of the employees of the Adolph Coors Company are involved in construction work as far as expanding the brewery is concerned, and there is no construction company in the State of Colorado that is larger or any company in the State of Colorado that has a larger engineering force, both of which are dealing solely with brewery expansion (Tr. 2880). By 1980, the present forecasts indicate that brewery production will have reached 20,000,000 barrels (Tr. 2914; RX 189 B), with this figure climbing to 25,000,000 barrels by 1982 (Tr. 2916; RX 189 B). By this time, Coors will be producing all of its own aluminum cans and this long range planning also involves barley growth expansion, as well as the expansion of all

phases of the malting, brewing and packaging facilities (Tr. 2917).

He testified that survival is the only factor that entered into the decision to keep the Company on a constantly expanding basis (Tr. 2918). The availability of resources is the only thing that limits the ability of the Coors Company to grow, and all of these resources are internally generated. Although the founder of the Company borrowed money, the second generation never borrowed any money and the present generation, the third, has never borrowed any money (Tr. 2918). Only 2% of the total cash flow is paid to the stockholders of the Company (Tr. 2919).

The Adolph Coors Company started the development of the aluminum can back in 1954 through its wholly owned subsidiary, the Coors Porcelain Company (Tr. 2871). The Adolph Coors Company is now totally converted to aluminum cans (Tr. 2871; RX 169, p. 10). The aluminum cans are superior because they are only a two-piece can rather than a three-piece can and, in addition thereto, there is no weld on the main body. Joints and seams cause unsanitary conditions and interaction between the beer and the metal as beer eats through the lining at these points (Tr. 2869). The aluminum recycling program as initiated by the Adolph Coors Company has created a favorable image from an environmental standpoint (Tr. 2894).

The Adolph Coors Company has envolved a new can packaging innovation which will result in easy opening devices which remain with the can (Tr. 2929; RX 196, p. 10). The aluminum

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can permits a complete ecology effort (RX 169, p. 10). Further, these cans will be stuck together in six-pack packages by glue, rather than using paper carton carriers (Tr. 2929). The Adolph Coors Company has a policy to pay its distributors 10 cents a pound for aluminum cans returned for recycling purposes (RX 180 A). The Adolph Coors Company

also has a bottle recycling program, the success of which depends on good retailer relations between the distributor and the retailer (RX 175 H). Adolph Coors Company distributors have received grateful recognition in their marketing areas for these ecology efforts which center on these distributors (RX 172, p. 19). The public acceptance of the recycling program is obvious in the nature of the increases which have been experienced in the can return program (RX 170, p. 3).

The respondent admitted in its answer that it unilaterally imposed vertical territorial limitations upon its distributors. Mr. Coors stated that the care and control of the beer required territorial limitations so that minimum stocks could be maintained at the retail level (Tr. 2879). The only way the respondent can monitor its distributors' performance is with these limitations. Mr. Coors further stated that the elimination of territorial restrictions would wipe out 75% of the small retail accounts (Tr. 2891). Mr. Coors stated that shortages of beer prevented the beer from being marketed in places like Houston, San Antonio and Portland or any areas outside the existing distributors' territories (Tr. 2878). Furthermore, he testified that Coors restricts territories in which distributors are permitted to market because that is the only way Coors knows to provide the market coverage that Coors has to have (Tr. 2878).

Much of the hearing and briefs have dealt with pricing and to completely evaluate it the Judge starts with the Coors philosophy as stated by Mr. Coors that the brewer, distributor and retailer must get a fair take of return on their investment (Tr. 2885). Discounting at either the brewer or wholesale level severely damages the quality of the beer because it results in over-age beer in the market place (Tr. 2895). This one factor, alone, according to Mr. Coors, has put more breweries out of business than any other single practice (Tr. 2895).

Mr. Coors stated that he has never threatened a distributor with termination as alleged in the Commission complaint (Tr. 2885).

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As far as central warehousing is concerned, Mr. Coors stated that CX 2030 was completely irresponsible and unreliable simply because of impossibility and the fact that you would be dealing with a different product (Tr. 2882-2885).

TESTIMONY

Proceeding now to individual witnesses called by complaint counsel, relevant portions of their testimony are hereafter set forth in some detail. No attempt is made to be all inclusive with the witnesses as to their total testimony. Such would be time consuming and unduly cumulative.

1. Everett L. Barnhardt.

Everett L. Barnhardt testified that he is a Vice President of the Adolph Coors Company and has held that office since 1959 (Tr. 234). Mr. Barnhardt identified CX 349 A-Z 150 to be a policy manual covering policies for representatives and distributors of the Company which was probably prepared in the Coors sales and marketing departments (Tr. 242). Mr. Barnhardt does not recall ever making any recommendations for changes in the manual (Tr. 243). The manual is for the time period June, 1970, and is updated as of that time (Tr. 243). Mr. Sewell is in charge of the M.I.A.C. and Mr. Barnhardt does not know what the initials stand for, but Mr. Sewell's principal responsibilities are the accumulation and compiling of statistical data (Tr. 252). Mr. Barnhardt does not know whether Mr. Sewell keeps track of prices by users in the territories, but he does know that Mr. Sewell keeps track of the market sales in Coors' territories (Tr. 252-253).

Mr. Barnhardt approves F.O.B. prices before they are announced (Tr. 265). He approves of applicants before they are given a Coors distributorship (Tr. 266). The marketing department decides which distributors are terminated from Coors and Mr. Barnhardt always approves the decision before it is announced (Tr. 266-267). CX 351-B states that a distributor is to distribute aggressively in a manner satisfactory to Coors, which Mr. Barnhardt stated means following

of various Company policies outlined in brochures, and understandings both written and verbal (Tr. 274). CX 348 is a part of those brochures. Distributors

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must operate in compliance with all laws (Tr. 275-276). One of the reasons for a distributor termination would be his failure to show cooperation with Company policy and suggestions (Tr. 278). Mr. Barnhardt does not participate in interviewing applicants for Coors' distributorships, but he does generally have a conversation with them before they are given a distributorship (Tr. 283). In these conversations, Mr. Barnhardt stresses the Coors philosophy, but he does not bring up the matter of Coors' pricing policies in these conservations (Tr. 284).

Mr. Barnhardt testified he doesn't know whether Coors' distributors have given deals to get a franchise account, but he thinks that would not be a wise or desirable thing to do (Tr. 292). He has recommended to distributors that they do not make deals or discounts to franchise accounts (Tr. 292). Mr. Barnhardt's understanding of central warehousing is someone who buys in great quantities at a central spot to redistribute to numerous outlets (Tr. 293). Mr. Barnhardt is not aware of any franchise accounts that have an agreement with Coors (Tr. 295).

2. Jerald B. Sewell.

Jerald B. Sewell is currently Manager of Marketing Information Analysis Center (M.I.A.C.) of Coors (Tr. 331). His main responsibility is to maintain records (Tr. 332). M.I.A.C. is also responsible for preparing marketing studies. He regularly makes studies of the percentage of the market that each distributor has in his own area and these are up-dated on a monthly basis as information is fed in from the various states from state agencies (Tr. 334).

3. Eldon D. Danenhauer.

Eldon D. Danenhauer, of Topeka, Kansas, doing business under the name of LAPEKA, INC., has been a Coors distributor since March 1, 1968 when he acquired the distributorship through a purchase from a Mr. Steinhoff, pursuant to an agreement Mr. Danenhauer himself negotiated with Mr. Steinhoff, at a price of $291,000 (Tr. 375, 429) and markets in eight Kansas counties. On direct examination, he testified (Tr. 364-447) that his current Coors sales representative is Jack Pearson who was preceded by Mel Linn. He would see them approximately once every six weeks or oftener. He stated (Tr. 378): "Well, they come in and suggest things, they offer suggestions and guidelines to help my organization

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and to upgrade it, try to see that I follow the policies and philosophies of the brewery."

These men have been a substantial help to him and are reliable. "The original pricing was basically what the former owner had been selling for, and my idea of what I felt I should charge for the wholesale price" (Tr. 379; CX 2292). Whenever he adopted new prices, he advised the brewery of these charges when he put them into effect (Tr. 404). After commenting on a number of price suggestions and changes, the witness was asked (Tr. 400-401):

"Q. Did you discuss the prices you adopted in July 1970 before you adopted them?

"A. All I can recall, and this is in June of 1969 when I received a new price suggestion from the brewery, they were given to me, and they said, at that time, I believe Mr. Pearson said to the fact that these were our suggested prices to you, and do whatever you want. Let me have a copy of what you do, and you've got it. And that's what I recall."

Since he has been in business, Coors' representatives recommend to him retail prices for customers and from time to time he accompanies representatives on visits to retailers to discuss with them the recommended retail selling prices (Tr. 417). "There are steady accounts in our area that fall below our recommended prices all the time. * * * I just informed him [Pearson] that it was happening and we were still delivering to them all the beer we could afford to give them" (Tr. 409). He could not say that the brewery had encouraged him to have exclusive Coors draft beer accounts: "It's my understanding that it is best for the retail account, the consumer, and us" (Tr. 413). In the years 1968, 1969, 1970, and 1971, there were in his territory a total of 160, 168, 179 and 182 draft accounts, respectively (CX 2281), out of which 35, 47, 54 and 76 draft accounts, respectively, were using Coors exclusively. There were two Coors split accounts in 1968, and one in each of the other three years. Most of the draft accounts, which do not serve Coors, handle another brand of draft beer exclusively (Tr. 415).

On cross-examination, Mr. Danenhauer testified that the negotiations for the acquisition of the Steinhoff organization were between the Steinhoff people and him and

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his attorney; that Coors did not in any way dictate to him any terms of that agreement; that the figure paid included a blue sky (Good Will) figure of approximately one-twelfth of the Steinhoff sales of the previous year which he understood to be used in the beer industry (Tr. 428-429); that CX 2280 shows the prices he has charged the retail accounts ever since he became a distributor; that he sets all of these prices; that he discusses those prices with representatives of the brewery, but he makes the final determination; that the eight counties in Kansas in his territory are his responsibility; that he has no desire to distribute elsewhere; that he now has an investment of around $800,000 in his distributorship and he would not make that investment if Coors were to put another distributor in the same territory (Tr. 443-446). All exhibits introduced by complaint counsel, which showed Mr. Danenhauer's prices,

were prices set by Mr. Danenhauer himself (Tr. 444), the determination of prices was Mr. Danenhauer's alone, and he was never threatened in any manner by the brewery (Tr. 444).

4. Jay Wagnon.

Jay Wagnon, of Wichita, Kansas, testified (Tr. 449-521) that he has been a Coors distributor under the name of W. W. Sales Company at Clinton, Oklahoma, since 1952, where he has twelve counties; that he has been a Coors distributor under the name of Wagnon Sales, Inc., at Wichita, Kansas, since 1954, where he has four counties; and that in Wichita he distributes other brands of beer, Pabst, Carling, Colt 45, Hannigans and Metz, and in Oklahoma, he has Falstaff (Tr. 449-451). On direct examination, there is considerable testimony relating to discussions with reference to prices charged the retailers by Mr. Wagnon and the suggested prices made by Coors' representatives and officials, some of which made by Coors' representatives and officials, some of which he followed and others that he refused to put into effect. In view of the admissions made by the witness on cross-examination, it would not serve any purpose to go into the details of the direct examination. Mr. Wagnon testified on cross-examination that, in arriving at prices he charged his retailers, he discussed the matter with his son, who is his sales manager, and other distributors (Tr. 493-495); that the brewery never did anything other than suggest prices (Tr. 498); that he was told by Coors' officers that the final determination on prices was his, and his alone (Tr. 506); that his sales representative, Mr. Linn, never once asked to approve any of his prices (Tr. 512); that he discussed

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with his retailers the matter of making a reasonable profit; that his distributorship had been short of beer for many years (Tr. 514); that discounting by retailers in their prices of beer, including Coors, has been going on for many years (Tr. 518), but that he on his own decision does not tolerate deals and discounts (Tr. 514-515); and that the supermarket people in

general had specials which were below the suggested prices, and they set their own prices at the prices they choose (Tr. 518).

5. John P. Ward.

John P. Ward testified (Tr. 521-565) that he has been a distributor for Coors under the name of John P. Ward, Incorporated for fifteen years. His territory consists of Wyandotte, Johnson, and Miami Counties and the eastern part of the State of Kansas. His sales for 1968 totaled $1,261,785.52 and rose to $3,164,445 in 1971 (CX 2306). Coors' representative for the last three or four years has been Jack Pearson, and his predecessor was Mel Linn; he sees Mr. Pearson about six or seven times a year; both Mr. Pearson and Mr. Linn are "definitely" reliable persons (Tr. 526-527). He is generally familiar with the Coors policies and, as to pricing policy, he answered (Tr. 527):

> "Well, I put my own prices into effect, and I may listen to their suggestions when a new package is coming out or when there is a tax rise or when there is a railroad freight increase I listen very diligently but I know my business and they know theirs. So, if I see fit to put a price on the product more generally it is much higher than what they and we were talking about."

He has a contract with Coors and, when asked, "Does that contract permit them to terminate you"?, he answered, "If I do something wrong, certainly" (Tr. 529). He has never offered to sell beer to any of his accounts at a discount, and has never given a case free with a number of cases. He stated: "That is a policy of my own through years of experience, that you just cannot buy your business" (Tr. 540-541). He understands that is also a Coors policy and he thinks that he would no longer be a distributor if he violated that policy. He believes he has heard that Coors wants all of the retail accounts to make a profit on Coors beer and not to sell at a loss (Tr. 541); "Some of them try to run your brand as the leader and we just don't like to

[Part 2, p. 1001]

have that to happen" (Tr. 542); he understands that Coors doesn't like that to happen either (Tr. 542). He agrees with that policy "100 per cent"; he "definitely" talks to his retail customers about fair profits on Coors beer. He testified (Tr. 542-543):

> "Well, if they do try to sell it at a very cheap price I try to advise them not to do it because they are just messing up the market when they do. And the beer, for them to sell it at a cheap price, just isn't available."

On cross-examination, Mr. Ward testified that he determines his prices to the retailers set forth in all of the pricing documents introduced by complaint counsel and received in eivdence (Tr. 559-560); he would not have invested the considerable amount he has in his distributorship if he did not have a territorial right in which he distributes Coors beer (Tr. 560); he does not have enough beer "to take really good care of the territory that I have"; and this beer shortage has existed for fifteen years (Tr. 560); he has both exclusive and split draft accounts in his territory, and does not have a policy against split accounts; as to "Coors' philosophies", as alluded to by complaint counsel, he has never "been coerced or threatened in any manner, way, shape or form" (Tr. 562).

On redirect examination, the following exchange took place (Tr. 562-563):

"Q. You stated you had a considerable investment in your distributorship, Mr. Ward. Would you state for the record what it is today?

"A. The first of the month it will be almost $800,000.

"Q. Thank you. You said you would not have invested this amount of money in your distributorship without a territorial right. Would you tell us why?

"A. I would be foolish.

"Q. Why?

"A. Why would you throw money down a hole, so to speak?

[Part 2, p. 1002]

"Q. Can you explain a little more completely why it would be throwing money down a hole?

"A. When I invest money I feel that I am capable of taking good care of it. By taking care of it, in this particular line of business, is production, penetration of the market, quality merchandise served every day, day in and day out.

"Q. You couldn't have achieved these things without a protected territory?

"A. No, I could not have, couldn't even have dreamed.

"Q. Why?

"A. Say, for instance, you are a distributor in the state and you have purchased a lot of beer and you didn't sell it and it got old and you came in my market and dumped it at a price 50 cents off a case, like some of them are doing, what do you think that would do to my territory and my investment?

"Q. What would it do?

"A. It would knock the hell out of it.

"Q. Someone coming and selling at a lower price?

"A. Why certainly, and stale old beer."

On recross-examination, the following took place (Tr. 563-564):

"Q. Let's assume, and you used the word market penetration, Mr. Ward, what do you mean when you use the word market penetration?

"A. I try to sell every account every one of our packages.

"Q. How many accounts do you have in your counties?

"A. All but 38.

"Q Let's assume for a minute that there was another Coors distributor in the same counties in which

[Part 2, p. 1003]

you distribute, and let's assume further that the Adolph Coors Company, on the penetration theory, requires each of your distributors to call on all 660 accounts, now, what is going to happen to the price of beer in that territory?

* * *

"A. Well, I don't think either one of us would make any money. We couldn't stay in business fighting that way, lowering the price."

6. Cecil Chance Scott.

Cecil Chance Scott testified (Tr. 567-644) that he is now and has been since 1966 a Coors distributor doing business as 4-C Distributing Company, San Angelo, Texas, having an assigned territory of nine Texas counties (Tr. 577). He first applied to be a Coors distributor in 1945, and reapplied in 1963 or 1964 (Tr. 568). Before becoming a distributor, he was first interviewed in August 1965 at Wichita Falls, Texas, by two Coors representatives who inquired what his philosophy was pertaining to discount pricing, etc., and he responded (Tr. 570): "I had come from a real competitive line of business in the rock bit business. I had always been and am now violently against dealing, cutting prices, kick backs because I had been a victim of a lot of that." He went to the brewery at Golden, Colorado, for his second interview and he does not remember anything said on discounting or

price, stating (Tr. 574): "They were wanting to know more about me than I was wanting to know about them. We talked more about my background and so forth than we talked about how Coors operated."

In fact, the witness was questioned at such length by complaint counsel about his wholesale prices since 1966, that the Examiner was provoked to inject himself (Tr. 601):

> "HEARING EXAMINER JOHNSON: And as I take it, you used your own judgment after discussing the matter, whether you should raise your price or shouldn't?
>
> "THE WITNESS: Yes sir, I sure do.
>
> "HEARING EXAMINER JOHNSON: Did you think you were being intimidated in any way?

[Part 2, p. 1004]

> "THE WITNESS: I have never been intimidated by Coors or any of their people in any way to any of my knowledge or I didn't take it that way. I have never been intimidated about anything."

The witness prepared a current list by name of every draft account in his marketing area and the brand of beer sold by each account which complaint counsel used as a Commission Exhibit (CX 2308 A-B). Of the total of 69 draft accounts, Coors had 23 customers, 12 exclusive and 11 splits; 23 accounts served other brands of draft beer exclusively. The Commission's own exhibit closely shows no exclusive draft discount policy here. And in those accounts where he does not have Coors draft beer, he has other packages of Coors beer (Tr. 636).

When asked as to the Coors Company policy with regard to split draft accounts, the witness said (Tr. 612-613):

> "Only that split accounts, that we try to get them exclusively if we possible can, and in the interest of

serving good beer and so forth, I was told when I started why split draft accounts, how they could cause me trouble and why I should try and persuade the retailer to go one brand of beer, and we even persuade them to go one brand of beer if it's not our beer. I did that just this week."

To the question, "Why would you do that?", he said (Tr. 613):

"Well, sir, when a waitress takes an order and two kids order a Coke and three others order a beer and somebody orders something else and one type of beer and she gets it all on this tray and turns it a half around nobody knows what they got. We just like to have our beer served in our glass, in a good clean glass. We like to have a good clean beer. That is the only reason for it at all. I have had split accounts since I opened my doors and we have accounts that take great pains with their employees and say, 'You put Coors in the Coors and Brand X in that glass and you can give them exactly,' and they have been doing it, and they serve a good beer, and I have no objections to that at all. I only have objections when they start serving somebody else's beer in my glass or serving my beer in their glass telling them it is their beer."

[Part 2, p. 1005]

He suggested retail prices to his accounts. He recalled a problem he had with Harry's Food Store; he asked them not to use Coors beer as a leader and football the prices, up and down (Tr. 602-603). Deliveries were stopped. He was sure that he discussed the problem with the Coors representative (Tr. 604). When asked what Coors suggested, he stated (Tr. 605):

"I don't remember the Coors people as much as I do other distributors. When this thing happened I remember asking other distributors. I was asking them for advice, this, that and the other, about how to handle

situations, I am new in the business. I remember definitely other distributors discussing over a beer or lunch that footballing beer would hurt the sale of it. They probably advised me of it. I certainly couldn't advise them, I didn't know."

He knew Mr. Harold Letcher and has had several discussions with him over a number of years (Tr. 615). Mr. Scott stated that he could have said to Mr. Letcher, "If you advertise my beer at a low price other companies will think I am giving you a discount" (Tr. 615-616). He further testified (Tr. 616-617): "Well, sir, he [Letcher] is a very controversial man, and no one gets along with him, the liquor dealers, any of the other beer. We are not the only one. Mr. Letcher is just that type of man. * * * As I said before, I could have said to Mr. Letcher I think that discounting in the paper would hurt me with other retailers. I'm sure that I have said that or probably have."

He stated that Mr. Letcher sells whiskey and beer in two stores in his territory; that he sells Coors beer to Mr. Letcher in those two stores; that he has never cut Mr. Letcher off; and that he has been delivering to him for six years (Tr. 622).

On cross-examination, Mr. Scott testified that he did not pay anything as a consideration for obtaining his distributorship (Tr. 629). He has been short of beer regularly since he became a Coors distributor (Tr. 635-636). In all of the years that he has been a distributor, he has fixed the prices that he has charged the retailers for beer, and the retailers, themselves, fix the prices that they sell Coors beer for (Tr. 631). With reference to Harry's Food Stores' (Polunskys) transaction referred to on direct

[Part 2, p. 1006]

examination, the witness said (Tr. 633-634):

"Things that would be unbelievable that we were faced with. When this came out in the paper retailers called me and said 'How come you didn't give me a

discount?' I said, 'I don't give anybody a discount.' They said, 'Now, don't tell us that you are not discount because I know the Polunskys, they have been in business here for 40 years or more, and they won't discount unless they get a deal.' I said, 'Well, they sure have this time.' Then they called me a liar, they called me everything, and I am new in the business, and it concerned me. I was accused and I just went through this thing not long ago, again, in another. So, that is what lead up to the argument with the Polunskys. Whenever we got together on the telephone I am sure that I related this to him, and he probably said, 'Well, you can tell them to ask me. It is a hot item, a new item, and I am going to do this.' You know how a conversation would probably go. Right now I don't really remember whether I cut him off or he kicked me out. It was just a disagreement, it was an argument."

Cecil Scott testified that the book value of his company is $120,000 and he would not have invested that amount to be the Coors distributor if he thought there was going to be another distributor in the same territory working the same accounts (Tr. 637-638).

7. Raymond Willie, Jr.

Raymond Willie, Jr. of Dallas, Texas, testified that he has been president of Willowbrook, Inc. since May 17, 1966. Sometime in August of 1965, he made application for the Coors distributorship in Dallas (Tr. 647). He was interviewed the first time in Dallas on March 17, 1966 (CX 2212 A-D). His three partners were present at the interview and gave general information about their backgrounds; they were informed that, if they were to be the Coors distributor, they would be expected to obey the taxes and the federal laws to the letter, and that they would have to be good citizens and participate in civic affairs (Tr. 646-650). He stated that the Coors representatives passed on to them some of their philosophy; he does not remember their going into any pricing and pricing was not discussed at a subsequent meeting (Tr. 650-651).

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Sales were increased from $6,476,622.47 in 1968 to $13,365,107.73 in 1971 (CX 2324 A-B).

They received from Coors a document (CX 2309) on May 17, 1966 when they became a distributor containing a list of suggested selling prices to retailers (Tr. 657-658). They did not follow the suggestions; the partners discussed it among themselves and they determined what to sell the beer for (Tr. 657-659, and see CX 2309).

When there was a price change by the brewery in the summer of 1968, he had discussions with Coors personnel and they suggested several new prices to him (Tr. 662); Mr. Willie and his organization followed one of the price suggestions by Coors but changed three out of the four (Tr. 663).

Mr. Willie testified that his company suggested the retail prices that their customers use. When he became aware of discount prices of their retail accounts, he would talk to them; he just took it upon himself to go out without Coors' encouragement. He testified (Tr. 668): "We suggest a lot of prices in our market. We are not always able to get the retailer to go along with our suggestion, but we do suggest."

He was aware that one of his retailers had been cutting prices from time to time at the retail level in the Dallas area, but their price cutting had been ignored by him (Tr. 653-654; CX 2212 C).

He talked to Coors' representative in regard to the special selling prices of Wards Cut-Rate Drug Company and, in describing the conversation, he said (Tr. 671-672):

> "Just the general gist of the thing, as I had felt that I should continue to see Wards just as I would any other retailer that would continue to sell our brand at less than retail price, and I have had many visits with Wards drug chain as well as Skillerns Drug chain that does the same, and I've talked to their buyers, pointing out their cost

and so forth, and both buyers have both been nice and polite and very good customers of ours, but have told us in no uncertain terms that this merchandise was theirs, and they would sell it at the price they wanted to. They have continued up

[Part 2, p. 1008]

until this date to sell it for the price they wanted.

* * *

"I can't remember talking to Mel [Mel Linn, Coors' representative] about it. I can remember talking to the buyer at Wards from time to time, and I think this has been two or three times where we have had – not had enough beer, and I pointed out to them in advance by saying, 'Look, we're not going to have cans, or we're not going to have bottles, or whatever package it's going to be. We're going to have to put you along with everybody else on allocation,' and I have mentioned that to him, and I don't mind telling you why because for me, it would be tremendously embarrassing for him being on allocation and trying to advertise something he wouldn't have enough of, would be misleading to the public. So I have always gone to them, pointing out to them when we had shortages."

The witness said there was a time when Coors expressed dissatisfaction with the way his distributorship was performing (Tr. 673). The situation is well expressed in a letter from Coors (signed by Robert Eke) to Willowbrook, Inc., dated February 11, 1969 (CX 2327 A-B)

In a letter to Coors, dated February 18, 1969, and signed by all of the partners of the distributorship (CX 2329 A-B), it was said in part by Willowbrook, Inc.:

"We wish to advise you that all management disagreements have been resolved.

* * *

"As a result of these meetings, we have resolved the problems that were facing the management of our company and we have emerged as a stronger four-man team that is fully capable and enthusiastic to do the job assigned to us of building a strong and successful distributorship in the Dallas market for the sale of Coors Beer.

"We feel that the management problems encountered and the assistance of the Adolph Coors Company through meeting with us has been most beneficial and we want to express our thanks for the consideration shown us and hereby pledge and rededicate ourselves to making Willowbrook, Inc., a distributorship of which Adolph Coors Company can be justly proud."

On cross-examination, he testified that he did not pay anything for his distributorship rights (Tr. 689). The partnership has about three-quarters of a million dollars invested in their Dallas distributorship; they wouldn't invest that kind of money were it not for the fact that they would be the only Coors distributor in the territory (Tr. 689-690). The witness produced a document which had been marked as CX 2325 but had not been offered in evidence by complaint counsel which gave information of the draft accounts in their market and showing numerous split draft accounts. With complaint counsel's consent, it was received into evidence at the request of counsel for respondent as originally marked (Tr. 693-694). The document reads:

ANALYSIS OF DRAFT ACCOUNTS IN DALLAS MARKETING AREA

	TOTAL DRAFT ACCTS.	TOTAL COORS ACCTS.	EXCLUSIVE COORS ACCTS.	COORS SPLIT ACCTS.
DEC. 31, 1968	521	80	62	18
DEC. 31, 1969	549	104	79	25
DEC. 31, 1970	544	119	92	27
DEC. 31, 1971	622	142	121	21

Coors beer is widely advertised in their market at less than their suggested retail prices; the sales prices to the retailers are set by the partnership; they have never been coerced, intimidated, or threatened by any member of the Coors organization for any reason whatsoever (Tr. 695).

On redirect examination between the witness and complaint counsel the following exchange took place (Tr. 700):

"Q. Mr. Willie, you said you wouldn't have invested your three-quarters of a million dollars, whatever amount you're going to

[Part 2, p. 1010]

invest in the next few months in this distributorship, if you felt that there would be more than one distributorship in this area. Would you tell us why?

"A. Well, if we were awarded Dallas, Rockwall Kaufman, whatever we were given, if other Coors distributors are going to come into that market and are going to sell Coors beer in that market, then, it is certainly going to raise our price, and it is certainly going to raise the price to the consumer; but forgetting about the consumer a minute, if some other Coors distributor comes into our area, then, we are not going to make the profit, and the price of the beer is going to be increased because we are going to all have to perform the full Coors service which is rotation in merchandising and watching the quality of the product."

8. Wayne Campbell.

Wayne Campbell, of Oklahoma City, Oklahoma, testified as follows: He is now employed by Ford Distributing Company, Oklahoma City, a Coors distributor; that he has been employed by Coors from 1956 to 1958, first as a tour guide and later as a sales representative; that he joined Ford

Distributing Company in 1958 as executive vice president and general manager (Tr. 723-724); that Ford's territory consists of central, northeast and east Oklahoma and the distributorship is one of the largest in the Coors family (Tr. 724). The situation with reference to draft accounts in the area served by Ford for the years 1968, 1969, 1970, and 1971 is as follows as shown by complaint counsel's exhibits:

	1968	1969	1970	1971
Total in the Area	743	764	876	951
Coors exclusive	496	548	653	734
Coors split	28	22	23	32

(CX 2336, 2337, 2338 and 2339; Tr. 728-729)

[Part 2, p. 1011]

In 1970 Ford's profits were dropping and they attempted to get some answers to their problem (Tr. 739-740). On their own initiative, they prepared a written analysis of their operation for a five year period ending September 30, 1970 (CX 2355 A-J), which was presented to Coors. Mr. Campbell testified as follows in this regard (Tr. 740-741):

> "We asked for their suggestions because we realized that they had experience on methods of operating more efficiently.
>
> * * *
>
> "This [CX 2355 A-J] is an outline of our company, a comparative statement of our income for given periods and some of our profit and loss statements, some examples of that, and also a little payroll information. We presented this for the purpose of seeing if the brewery could give us any suggestions on what's wrong with our operation in relation to profits; and as it turns out, and as I said, this was the article here that gave us the idea to put in three or four programs and cut dead wood and operate it more efficiently in 1971."

A meeting was held in Golden, Colorado, about January 30, 1971, at which Coors people were present, together with Mr. Ford and the witness. He stated (Tr. 744):

> "We didn't raise our price because we came up with a more realistic solution. Do you want me to explain the whole thing?
>
> * * *
>
> "Q. Just tell us what happened at the meeting.
>
> "A. We decided to come up with a cost of operations index figure and incentive plan to operate more efficiently. We discontinued, we laid off or let go two of three people that we felt were dead wood, and we also got rid of a connection that we had with another company that we felt was pulling us down, and we operated more efficiently in 1971, and we made more money in '71. It was more realistic than raising prices and that was our decision to make."

[Part 2, p. 1012]

On cross-examination, Mr. Campbell emphasized his concern about the hazards involved in draft beer accounts which he had gone into on direct examination (Tr. 745-746):

> "The biggest thing we worry about at Ford Distributing Company is quality. That's what has made us what we are, that and a lot of hard work, and we have split accounts that jeopardize that quality in some cases. By this, I mean that we have even had examples of retailers that split with another beer, and they couldn't sell the other beer, and they'd put Coors tap knobs on that beer and sell it. We've had CO_2 restriction problems which our beer draws at a certain pressure; and if that pressure is not maintained, the quality of Coors again is diminished. We've got refrigeration problems in Oklahoma City, for example, coming out of our ears,

and we just cannot deliver adequate amounts of beers to retailers that don't have adequate refrigeration facilities. We also have problems with misrepresentation of the product where a customer asks for a Coors and he gets another brand, and there are multiples of problems.

* * *

"Equipment is another problem, gas gauges, et cetera, and refrigeration. We find that equipment problems are probably as bad in our market, for instance, as I've ever seen them, and in a split situation it isn't conducive.

Ford suggests retail prices to its retail accounts, but the retailer, himself, makes the final determination on what he will sell for. The retailers are not penalized for failure to follow the suggested retail price. He stated (Tr. 747): "As a matter of fact, many of them are not following our suggestions right now." They still have Coors beer available to them.

He testified that they discuss with the retailers the selling prices of different brands including their own and discuss suggested profits so the retailers can make a reasonable profit; and they talk to Coors' sales representatives concerning the wholesale prices. Mr. Campbell testified (Tr. 736):

[Part 2, p. 1013]

"We set our wholesale prices depending upon the situation of our company at a given time and we try to work it on a profit margin. We take a lot of advice from our accounting firm as to our prospects on profit.

* * *

"We discuss it [with Coors' sales representatives], but we set our own prices."

9. William Louis Barrows.

William Louis Barrows, of Stockton, California, an

insurance salesman, testified (Tr. 758-773) as follows: He was a Coors distributor from March 16, 1964 to January 4, 1971; his territory consisted of San Joaquin County (California) south of the Eight-Mile Road (Tr. 759). He stated (Tr. 760): "We were supposed to sell within our territory because it wasn't economically feasible to go out of our territory anyway." On two occasions he sold from his warehouse to accounts from outside his territory (Tr. 760). He described Coors' position on these sales (Tr. 760): "Take care of your own territory, which basically they were right and I agreed with them." When he took over his territory in 1964, he arrived at his price to retailers by continuing the existing price of the former distributor. Whenever there was a price change, he posted the brewery recommended price on all occasions. He discussed with Coors that he wanted to initiate a price increase (Tr. 763). He attended several distributor meetings in Golden, Colorado, and he recalled Mr. Barnhardt and Mr. Bill Coors speaking; they "felt" that the price structures were such that everybody could make money and it wasn't necessary to chisel and it was in violation of the California price posting law anyway (Tr. 767). By "chisel" he meant "Selling prices below posted prices or giving free merchandise, things in that area" (Tr. 768).

On cross-examination, he said that he, personally, in any discussions he had with the brewery personnel, regardless of what the subject matter was, was never threatened or intimidated in any way (Tr. 769). Only once did he have a serious disagreement with the people at the brewery, when Coors wanted him to put non-union trucks on the road during the time of a strike; the brewery wanted Coors beer

[Part 2, p. 1014]

delivered during the strike. The subject that caused him to sell was his "refusal to put non-union trucks on the road" (Tr. 769). He testified further on this point (Tr. 769):

"Q. Was the selling out your choice or was it suggested to you by the brewery?

"A. That is kind of a hard question to answer, sir."

On redirect examination, he testified (Tr. 772): "If we could have agreed on labor, I probably would still be there." He decided to sell when it became evident what their wishes were; the sale was made to Rink Babka, and all negotiations in connection therewith were handled by the witness and his attorneys; the deal he finally made with Mr. Babka was the one he approved himself (Tr. 770-771).

10. Harold John Letcher.

Harold John Letcher, of Rowena, Texas, testified as follows: He is in the alcohol beverage package business with stores in Manard and Rowena, Texas, where he handles Coors beer. In January, 1966, he opened a store in Brownwood, Texas, doing business as the Handy Liquor Store. On June 3, 1966, Mr. Stewart Coleman, the distributor for Coors in the Brownwood area, refused to sell him any more Coors beer; at the time he was also handling Pearl, Lone Star and Schlitz beers (Tr. 776-777). He had advertised weekend specials selling certain beers below his regular prices. He had a number of discussions with Mr. Coleman after he (Coleman) stopped delivering Coors beer to him, and Mr. Coleman agreed to sell him beer if he would not advertise and sell at special prices, but this the witness refused to do (Tr. 777). On July 5, 1966, the witness wrote and sent a letter to Coors Brewery, stating that Mr. Coleman had passed him up after June 3, 1966, and that Mr. Coleman said he had orders from Coors' representative that his franchise would be cancelled if he delivered beer to Mr. Letcher's Brownwood store (CX 2005). On September 12, 1966, the witness again wrote a letter to Coors Brewery, stating that he had not received a reply to the July 5th letter. On February 6, 1967, he wrote a letter to Mr. Robert Eke at Coors Brewery, referring to the previous letters he had written without receiving a response, which stated his problem since no beer had been

[Part 2, p. 1015]

delivered since June 3, 1966 (CX 2014). In a reply, dated February 9, 1967, to the latter letter Mr. Eke advised him that he was asking Mr. Campbell and Mr. Coleman to contact

him. On February 10, 1969, before Mr. Letcher had received the foregoing letter, he telephoned Mr. Eke at Golden, Colorado, making a tape recording thereof. Over the objection of respondent, the Judge permitted the playing of the tape and the conversation between the two was set forth as a part of the transcript by the reporter (Tr. 804-805). He (Eke) said further in part (Tr. 817):

> ". . . we feel that we are obligated to all of our customers to hold up their margin of profit and we sincerely feel that you should appreciate this. Now, there is a lot of breweries and I can say without exception other than ours, that would encourage you to cut the price. Here, again, we feel that our product is going to represent a good deal of your profit and for this reason we feel that you should maintain a decent margin on it.
>
> * * *
>
> "We feel also that we are under obligation to the other retailers in the area to see that they maintain a decent profit."

As to buying from another distributor, Mr. Eke said (Tr. 820-821):

> "Here is the situation on this. All of our beer is pretty much allotted and the amount of beer going into the area is the amount that is going to take care of the needs for that immediate area. So if they start shipping it off, some of their own customers are going to suffer."

On February 8, 1967, Mr. Letcher taped a conversation that he had with Mr. Wayne Campbell, which took place in the former's office in Rowena, Texas, at which time Mr. Campbell said in part:

> "Well, we look at it this way, Mr. Letcher. We feel like we have a right to protect our product no matter what the circumstances are and we feel we have a quality image. It is a real fine product and

[Part 2, p. 1016]

we want to maintain it. We are doing this for one reason, to let the retailer make a profit. What hurts us is to see somebody not make a profit. [Tr. 837.]

* * *

"Oh, well, yes, Mr. Letcher, we couldn't care less about competitors. As far as we are concerned, we think they are all fine, they are fine people, we don't have any arguments with them at all, but we do have certain beliefs just like yourself and certain policies on our product that we like to follow and this isn't only true here, it is true everywhere. We know for a fact that we have the prerogative to not sell to price cutters. We can't come in here and tell you what to do because this is your prerogative what you do, but it is our prerogative also not to sell to people who degrade the image of our product. All we want to do is sell to the people that will make a fair profit and we will get along fine. [Tr. 837-838.]

* * *

"Well, I understand your situation, but quite frankly, as I said before, we have the same policy throughout all of our marketing areas, no matter if it is the biggest retailer or the smallest one, we have the same belief. As a matter of fact, the biggest retailer in the United States, probably we have had an understanding with them on that and they hold our prices up all the time. Now, they felt maybe the same way that you did first, but now they look at it this way. No other brewery but Coors, that we know of, has this kind of belief, this strong belief about pricing. So they go ahead and do whatever they want to with them, but with Coors, in order to keep Coors, this is the only way we will stand. We don't want it to seem like we are being overbearing about it. It is a policy we have had before we came in to Brownwood. It is a policy we will have when we go into

any other market. We have had it for years and years and this is the way we have built our reputation, our quality image. We know for a fact once we sell

[Part 2, p. 1017]

the beer to you we cannot tell you. [Tr. 839-840.]

* * *

"We are real proud of our record wherever we are and we feel it has been built not only on a quality product, which we feel we have, but also on an image that is created of being quality. The only way we are able to maintain that image is to not let our product be price cut, cut down and chopped down and degraded in image by prices. If a product is worth a certain amount, we think it should sell for that. We definitely are firm believers in our retailers making a profit. Once a retailer cuts our product, he is not making the profit he should and he is also degrading our image that we are so concerned with. We not only spend a lot of money on the product in making a quality product, but we want to let the people know and realize that it is quality. So this is the reason I certainly wanted to come by here today. [Tr. 841-842.]

* * *

"Well, here again we are not only referring to advertising in the paper, we are referring to the actual retail prices you are selling it for, in other words, what you price that for. It isn't only the advertisements in the paper that we are concerned about. It is the product, what it actually sells for. We will not tolerate price cutting. [Tr. 843.]

* * *

"Of course here again we are talking about what we believe. We are not trying to dictate anything. All we

have is a belief and once a person gets the beer, it is your prerogative to do whatever you want to do with it, but that doesn't mean we have to reservice you. [Tr. 845.]

* * *

[Part 2, p. 1018]

"If you sell the product for what it should be sold for, make a profit on it. We are asking one other thing, this is between you and our distributor, I would suggest this, if you decide that you want – we would like to have your business over there just like we have got it here, the same condition where you keep our product up, no specials, no cutting prices on it, keep it there, we could care less what you do with the rest of the beer, that is your business and their business. If you keep our beer at the same price, don't cut it, we would like to have the same relationship that we have here. [Tr. 846-847.]

* * *

"Well, actually as far as we are concerned, approach it the same way, they are not putting our beer on specials, they are not putting it in the paper, they are not cutting it, you are not having any unfair competition by this. We will be treated the same way by you as we will by them. That is fine with us. Where we don't have any price cutting or any advertising, that is all we ask and that is the reason I came by to have a man to man business talk with you. We want to show our appreciation, our respect, and let you know that we would respect your business and we would like to have it under these conditions, but this happens to be a basic brewery policy and we have had it for years. We had it before we came into Brownwood and we will have it forever as far as we are concerned because we find that it is the best policy we can have." [Tr. 848-849.]

Mr. Letcher sold a half interest in the Brownwood store in 1966 to Ralph Williams who was working for him as manager, and his other half interest he sold to Mr. Williams in August of 1971 (Tr. 866-867).

11. Ralph E. Williams.

Ralph E. Williams, of Brownwood, Texas, in the retail liquor, beer and wine business under the name of Handy Liquor Store, testified (Tr. 892-905) that he was manager of that store when it was owned by Harold Letcher. In 1966 he bought a half interest in the establishment

[Part 2, p. 1019]

from Mr. Letcher, and in August of 1971 he bought the other half. He sells all of the brands of beers that are available in their area. They had Coors beer in 1966 at the time he was manager of the store, when Mr. Letcher advertised and sold Coors and other brands of beer at special prices. He testified (Tr. 894):

> "Well, Mr. Coleman [Coors' distributor in that area] told us that we couldn't advertise, if we did he would have to discontinue selling to us, cut us off. So Mr. Letcher told him that he didn't want to have to get in the paper but if he advertised one major brand he needed to advertise the others, all of them, you know, and so he advertised Coors again and that was it."

Mr. Coleman refused to sell any more Coors beer to the store until August 1971 when the witness became complete owner of the store.

On cross-examination, the following exchange took place (Tr. 899-902):

> "Q. Actually, Mr. Letcher had problems with more distributors than Mr. Coleman, did he not, from time to time?
>
> "A. Not to my knowledge. He lived someplace else and I lived in Brownwood.

* * *

"Q. You don't know if he ever had any problems with any other distributors?

"A. Not there in my store, I'm pretty sure.

* * *

"Q. As a matter of fact, you knew that the reason your store didn't have Coors was because Coleman couldn't get along with Letcher.

"A. No, just because Coleman told Mr. Coors we couldn't have beer.

* * *

[Part 2, p. 1010]

"Q. . . . And you had a pretty good idea that when you bought Letcher out you could have Coors in that store, isn't that correct?

"A. I had a pretty good idea.

"Q. Where did you get that idea?

"A. Because Stewart Coleman was our friend and we figured he would let us have it if the brewery would let him do that.

* * *

"Q. Did Mr. Coleman make any conditions upon you in any way, shape or form when he brought that beer back in there?

"A. None whatever. He was the first truck out there to bring the beer when I opened up."

12. Henrietta Williams.

Henrietta Williams, of Brownwood, Texas, the wife of the previous witness, testitied (Tr. 905-914) that she first became associated with Mr. Harold Letcher on May 3, 1965 as a clerk in the Handy Liquor Store; that they had Coors beer in early 1966, and that, after they were running weekend specials in the paper, Mr. Coleman came to the store telling them "it was a brewery regulation that they didn't allow Coors to be run on special and advertised in the paper" (Tr. 908); that Mr. Coleman stopped delivering Coors beer to them and on June 10, 1966 the witness accompanied Mr. Letcher to Mr. Coleman's place of business and placed an order for certain packages of Coors beer tendering a cashier's check for $510 to cover the cost; that Mr. Coleman informed them "that as soon as the boys returned from their route he would send it out to us. The subject came up of advertising in the paper and running it on special and he told Harold no that he couldn't send him the beer if he was going to advertise it on special . . ." (Tr. 908-909). She testified further (Tr. 909):

> "Mr. Coleman. He said, 'I would like to sell you the beer but I have a hundred thousand dollar investment and I don't want to take a chance on it' and Mr. Letcher said, 'Well, I certainly understand that.' Then Mr. Coleman told Mr. Letcher that

[Part 2, p. 1021]

> There would be a brewery representative down in a few days and he might talk with him and see what they could do."

At the time of the conversation, Mr. Coleman was selling them Jack's beer and he delivered them that brand for several months (Tr. 910).

On cross-examintion [sic], when respondent's counsel referred to the testimony on direct "that Mr. Coleman told

you that he might lose his franchise or something to that effect", she said (Tr. 911):

> "He said that he was sorry that he would like to sell us the beer but he had about a one hundred thousand dollar investment and he couldn't take the chance on it because it was a brewery policy not to advertise the beer on special in the paper."

She further testified that she and her husband determine the prices at which they sell; that to a certain extent it is a fairly common way in the liquor business to watch your competition and see what they do; that she really wouldn't know if Mr. Coleman got along with Mr. Letcher; that Mr. Letcher seems to think Mr. Coleman is all right as far as she knows; and that they have not run any special on Coors beer since August 1971 (Tr. 911-913).

13. Sylvan Polunsky.

Sylvan Polunsky, of San Angelo, Texas, testified (Tr. 914-945) that he is vice-president of Harry's Food Stores, Incorporated and vice-president of Quick Stop Food Stores, Incorporated, both located in San Angelo. Harry's Food Stores is a superstore type of operation and in 1966 its volume of business was somewhat over a million dollars. They started selling Coors beer around the year 1966 when it first came into their market. The store stocked all beers and Coors had a good reputation so they wanted to handle it. They bought beer from 4-C Distributing Company, a Coors distributor, owned by Cecil Scott. On April 9 and May 14, 1967, in newspaper advertisements, Harry's Food Stores ran ads on Coors beer, six glass cans at a special discount price of $1.09 (CX 2019-2021). After that they ran out of Coors beer and were unable to get any further delivery. In a subsequent talk, Mr. Scott told the witness, "We do not sell to price cutters" (Tr. 924). On May 26, 1967,

[Part 2, p. 1022]

the following was contained in Harry's Food Stores' one-page advertisement (CX 2023):

"CUT – PRICES!

COORS SAID IT – 'WE DON'T SELL TO PRICE CUTTERS' – THAT'S HARRY'S WHERE YOU GET GROCERY BARGAINS BY THE BAG FULL! ALWAYS LOW PRICES PLUS YOUR CHOICE OF STAMPS. COORS WONT [sic] SELL US BUT ALL THE OTHER FINE LIGHT BEER COMPANIES DO – CHECK OUR SPECIALS!

The witness said they got Coors beer back at both stores in 1968, but they have not advertised nor discounted the product since then (Tr. 927).

On cross-examination, he said that he was upset with Coors because the brewery doesn't cut the price of their beer to him like the rest of the breweries; that every time he ran a special on beer, he had been given a big discount by that brewery some way or the other; and that the discounts take the form of, say, 50 cents a case rebate or 10 free with 100 or something along that line (Tr. 933). He testified (Tr. 934):

"Q. . . . Are there other supermarkets now in San Angelo?

"A. Yes.

"Q. And do they run specials on beer?

"A. Yes.

"Q. And isn't it true, when they run specials on beer you know that the brewery has been in there giving somebody a discount, don't you?

"A. I wouldn't actually, no [sic] what they are doing with other stores.

"Q. You've got a good idea.

"A. I would assume they were, yes.

[Part 2, p. 1023]

"Q. Sure. So whenever there is a special, some brewery, then they are given a deal, aren't they?

"A. I think so, yes.

"Q. As a matter of fact, you know that's the case.

"A. I wouldn't know it.

"Q. That's the way it's been with you every time.

"A. That's the way it's been with us."

It is very possible that Mr. Scott told him at the time he pulled the beer out of his store in 1967 that a lot of other retailers were accusing him of making deals (Tr. 943). Mr. Scott has told him that he is free to sell the beer at whatever price he wants, which Mr. Scott told him sometime after he got Coors beer back (Tr. 944).

14. Robert I. Pulunsky [sic].

Robert I. Polunsky, of San Angelo, Texas, doing business with his brother under the name of Harry's Food Stores, testified (Tr. 946-956) that the store sold Coors beer; that in the summer of 1967 they advertised and sold the beer at special discount prices and, as a result, Coors' distributor refused to sell them any more beer; that they opened the Quick Stop Food Store on June 17, 1968 and all of the distributors, except Coors, called on them to stock their beer; that they did not call Coors immediately but they had several calls for their product so he called Mr. Scott and told him he wanted to handle Coors at Quick Stop; that they met at a coffee shop and it was agreed to put Coors in both of the stores; that, although in the conversation Mr. Scott never made any definite statement nor any specific request, nor any deal (Tr. 952), it was the witness' understanding that Coors would not be discounted or he would pull it from them again (Tr. 950); that, since getting Coors beer back in the stores,

they have not advertised nor run it on a special nor had any problem of getting Coors beer (Tr. 950).

On cross-examination, the witness said that in recent years Mr. Scott has taken the position and stated to him that he could sell their beer for any price he wanted to (Tr. 953).

[Part 2, p. 1024]

15. John H. Pierson.

John H. Pierson, of Lawrence, Kansas, testified (Tr. 960-1049) that he is market sales representative of eastern Kansas for Adolph Coors Company and has been for three and a half years; that there are six Coors distributors in his territory; that he has been employed by Coors for twenty years, mostly in the capacity of a sales representative; that he has never recommended that a distributor in his territory be placed on probation, and none of the distributors has ever been placed on probation in Kansas (Tr. 975). Complaint counsel offered a document (CX 2412), dated November 1971, which was received in eivdence, and which showed that the retail prices charged by supermarkets in Topeka, Kansas, were lower than those charged by the liquor stores and that higher prices were charged by the so-called convenient store for Coors beer as well as competitive brands. The document also states that the prices of Seven-Eleven were higher than those of other retailers, with the exception of one item. At one of the regular meetings of the Coors people, the Seven-Eleven situation was brought up and discussed, but nothing was done about it (Tr. 1000-1001). The witness was examined at length by complaint counsel with reference to discussions had with distributors as to their wholesale prices, but there is no indication that any distributor was coerced or intimidated in this respect and the prices fixed were those as determined by the distributors.

16. Kenneth Hayes.

Kenneth Hayes, of Arlington, Texas, testified (Tr. 1051-1063) that he has been with Coors for ten years,

starting as a laborer and construction man, then went into the sheet metal shop, the public relations department, and into the marketing and sales departments. He has been a marketing representative since April 1967, and his duties include sales and marketing reports. He reports back to the brewery on the progress or regress of distributors and the care and control of the product. He testified that he prepared marketing data information sheets showing retail prices of Coors and competitive brands (Tr. 1053-1059) based on averages (Tr. 1069), but he didn't know what use is made of them at the brewery (Tr. 1059-1060). CX 2405 (Tr. 1063) is a report by the witness, dated March 13, 1971, regarding his visit to Del Rio Distributing Co., Del Rio, Texas, which points out certain shortcomings of the distributorship.

[Part 2, p. 1025]

17. Harvey V. Gorman.

Harvey V. Gorman testified (Tr. 1071-1116) that he is Marketing Director of Adolph Coors Company since 1969 and has been employed by the Adolph Coors Company for over 20 years in a variety of jobs (Tr. 1071-1073). He stated that Coors' distribution contracts specify a territory which the distributor is to service and that he couldn't recall any distributor wanting to sell outside of his territory (Tr. 1081-1082). He did suggest to any distributor that he not sell outside his territory because it is not desirable for him to try to sell outside when he doesn't have enough beer to sell within the area he has (Tr. 1081-1082).

He testified that while he was sales director for Coors all matters pertaining to terminations or deletions for business practices not in agreement with Coors' policies were discussed at the main office in Golden, Colorado (Tr. 1076). He stated that sales representatives' reports were used and supplied the reasons for eventual termination of the Orth and Hemphill distribution in Oakland, California (Tr. 1080). Mr. Gorman stated that distribution contracts contained 5 and 30 day termination provisions, and stated that the Coors philosophy on central warehouses is to deal through its distributors

instead of going through central warehousing to protect the control of the product (Tr. 1089).

On pricing Mr. Gorman testified that, if he felt that retailer prices were too low in some area, he would contact the Coors divisional manager to contact the area representative to speak to the distributor concerning fair profits (Tr. 1081-1085); that the area representative would talk to the distributor to see if he had talked to the retailer about fair pricing (Tr. 1085). He testified that the Company has a policy that distributors are to report price changes to Coors before a price change becomes effective, which some distributors do and some do not do (Tr. 1085); that he is familiar with area marketing price data sheets which divisional managers review to determine what is going on in the market place and to review with area representatives (Tr. 1086-1087); that, if these price data sheets indicated unusual situations, they would be noted by the territorial manager (Tr. 1087); that he participates in interviewing applicants before they are accepted as Coors distributors and that applicants are questioned as to their attitude about pricing – fair pricing but there is no single answer

[Part 2, p. 1026]

desired in response to the questioning and that the applicants answer the question in different ways (Tr. 1090); that most Coors distributors recognize the Company philosophy on fair pricing so that the consumer receives Coors beer at a fair price (Tr. 1090); that he is aware of a number of areas in California since 1965 where distributors deviate from posted prices, and there must be 10 or 12 of such areas that he can recall (Tr. 1091-1092); that divisional managers and sales representatives of Coors suggest prices to distributors and they have been told that the distributor makes the final decision on the selling price (Tr. 1096); that he attended a meeting at the brewery in Golden with Mr. Wagnon, at which Mr. Wagnon's prices were discussed, but nothing was decided at the meeting and no decisions were made (Tr. 1101-1102); that Mr. Campbell and Mr. Ford of the Ford Distributing Company requested a meeting with Coors in Golden in late

1970 or early 1971 and they would come to Golden for such a meeting and pricing was discussed at that time as part of the total picture of the distributorship's problems at that time (Tr. 1104); that this meeting with Mr. Campbell and Mr. Ford and Coors was to discuss problems in the distributorship because their margins were decreasing and that the Ford Distributing Company submitted a report to him for this meeting (CX 2355); that Mr. Campbell and Mr. Ford decided at the meeting to take a good look at their operation and see what they could do (Tr. 1108); and that there were no price agreements reached and that Coors does not make price agreements (Tr. 1108).

On cross-examination, Mr. Gorman testified that, if a distributor raised prices abnormally high, his sales would decrease which could wreck the distributorship (Tr. 1114); and that Coors for the last 20 years in its own operations has fought any increases in F.O.B. pricing and the only price increases during that period have resulted from things Coors could not control such as packaging costs, container costs, and the like (Tr. 1115).

18. Robert Eke.

Robert Eke testified that he is currently Sales Department Administrative Assistant at Coors reporting to Mr. Harvey Gorman, and that he has been employed by Coors over 40 years (Tr. 1127-1128); that he has been Administrative Assistant the last four years, and before that a divisional manager (Tr. 1128); that Coors' distributors are restricted to sales in certain areas

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required in their contracts (Tr. 1128-1129); that, if a distributor sold outside his territory, he would have been called upon to discuss the matter with his sales representative and that, if he still desired to sell outside his territory, Coors would request the distributor to come to Golden to have a conference with his sales representatives, Mr. Gorman and Mr. Eke (Tr. 1130); that the purpose of this meeting in Golden

would be to discuss the reasons that Coors felt it was wrong for the distributor to take beer away from his current customers and sell in some other area; that, if the distributor still sold outside his territory, Mr. Eke did not know what would happen, and Mr. Gorman would have to answer that (Tr. 1131); that Mr. Eke requests his sales representatives to report retail prices of the competition and Coors' prices to him at the retail and the wholesale level (Tr. 1136); that CX 2272 is a form used by the Coors Sales Department to know what the product is selling for at the retail and wholesale level for Coors and competitors (Tr. 1138-1139); that in reviewing any such document report, if prices seemed to him to be out of line for Coors, he would ask the appropriate divisional manager to check with the area representative involved to find out why the change took place (Tr. 1140); that the representative would be instructed to talk to the distributor on Coors' basic philosophy in such a situation (Tr. 1141); and, if retail prices were involved, that Coors would ask the area representative to ask the distributor to discuss this with the retailer (Tr. 1141); that these pricing reports are for information only, and to his knowledge no Coors executives have used them in any way except for information purposes to see what was going on in the field (Tr. 1144); that the extent of any discussions with retailers by Coors' distributors would be to use powers of discussion to seek to have the retailer uphold a suggested price if at all possible (Tr. 1142); that the Coors pricing philosophy and pricing policy are pretty much interchangeable in wording, meaning that Coors' products are sold at a price including a profit for Coors, that the distributor then sells the product allowing him a reasonable markup for profit, and that the retailer then sells the beer at a reasonable markup to the consumer, so that the consumer can buy it at a reasonable price (Tr. 1146); that insofar as training and instructions for sales representatives are concerned, they are told that pricing should be at a level where the retailers are all going to make a reasonable profit, and this is as far as Coors goes on instructions with its representatives (Tr. 1148); that Coors suggests minimum retail pricing and has reserved the right to cut

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off a retailer who does not support the suggested price, but this has never been enforced and he has never heard of a retailer being cut off by Coors for not following suggested minimum prices (Tr. 1148-1149); that the reservation of the right to cut off a retailer for not following suggested prices has never been put into effect but that Coors reserves the right to do so if it so chooses (Tr. 1151); that it is not the policy of Coors to achieve a uniform price at the retail level (Tr. 1151); that Coors requires distributors to notify it of proposed price changes before they go into effect so that, whether the prices are changed upwards or downwards, Coors consults with him so that he can make a decent profit to carry out his distributor responsibilities and maintain a strength position (Tr. 1153-1154); that Coors believes in pricing integrity as an essential part of its business and this is another way of saying that no discounting should occur on its beer (Tr. 1157).

Mr. Eke testified that he was familiar with certain problems that Harold Letcher had with a Coors distributor named Stewart Coleman (Tr. 1162); that he heard of the problem from Mr. Coleman, and that Mr. Coleman told him he was going to stop delivering beer to Mr. Letcher (Tr. 1162-1163); that to this day Mr. Eke does not know whether Mr. Coleman actually did or did not stop beer delivery to Mr. Letcher (Tr. 1163); that Mr. Letcher called him on the telephone and sent him letters concerning his problem with Mr. Coleman (Tr. 1163-1166); and that Mr. Eke, in response to Mr. Letcher's questioning, possibly told him that he didn't think there was a distributor from outside that territory who had beer available to sell to Mr. Letcher (Tr. 1167).

On cross-examination, Mr. Eke testified that wholesalers set their own prices and that the retail prices are set by retailers (Tr. 1170-1171); that concerning market price reports, they indicate a wide range of retail prices and are prepared on the basis of an average of retail price figures (Tr. 1172); when on direct examination he stated that representatives and distributors come to an agreement on pricing, he referred to the fact that both parties felt that that was the way it should go, but he didn't mean that they would enter

into an agreement (Tr. 1174); and that in any such discussion the final decision on pricing is made by the distributor and the only thing the Coors representative can do is hope that he comes to a desirable conclusion (Tr. 1175).

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19. Willard S. Johnston.

Willard S. Johnston, a lawyer who has been engaged in the practice of law since 1935 in the State of California, with offices in San Francisco, testified (Tr. 1178-1260) that he is now and has been for many years the attorney for Beverage Distributors, Inc. ("B.D.I."); that in 1955, B.D.I. was a wholly owned subsidiary of Safeway Stores engaged in the distribution of beer, wine and soft drinks in the State of California; that in 1958, due to the fact that there were almost continual legal problems resulting from proceedings and related matters instituted by beer wholesalers in California, Safeway divested itself of the ownership of B.D.I. rather than continue in a defense of seemingly endless proceedings, selling all of its stock to four individuals who were then officers of B.D.I.; that B.D.I., when it was a part of Safeway, did accept beer in a central warehouse and then shipped it to the Safeway Stores at its central warehouse; that B.D.I. then had two warehouses in California, one in the Bay area and one in Los Angeles, that, upon becoming an independent corporation from Safeway, a Mr. Morton became president of B.D.I., and continued in that position until he died in 1966; that, upon the death of Mr. Morton, it appears that the witness became the majority stockholder of B.D.I. and the Chairman of its Board of Directors. He recalled that there did come a time in California when B.D.I. no longer purchased beer from the Coors Company or its distributors and in this respect he testified (Tr. 1183):

"Q. Can you recall what happened at that time at all? Do you have any recollection how that happened?

"A. Well, I do recall that purchases were made of Coors beer from time to time during the '50's, and I do recall that in the late '50's or early '60's, efforts

> were made to purchase Coors beer by B.D.I. in California and B.D.I. was turned down."

He stated that, in addition to California, B.D.I. does do business in Nevada and Arizona; that they did regular business in Coors beer in Nevada until 1963; that by letter (CX 2053), dated October 14, 1963, B.D.I. was informed by O.K. Distributors, Inc., a Coors distributor in Reno, Nevada, that they were in violation of their contract with their parent company in selling at prices below what they were charging other retail accounts in the area, and as of November 1, 1963, their prices to B.D.I. would be the same as to other retail accounts in

[Part 2, p. 1030]

their area; that, in the opinion of the witness, the offer of the distributor to sell to B.D.I. at the regular retail price was "tantamount to a refusal to sell" (Tr. 1189). The witness discussed the matter with Mr. Morton and told him "I thought initially he ought to bring the matter to the attention of the Coors Brewing Company and see if it could be resolved, and that he should, also, of course, advise Safeway of the problem and apparent inability to continue to supply them with Coors beer in Nevada" (Tr. 1189); that a memo (CX 2054 A-B) from the files of Mr. Morton indicates that he talked to O.K. Distributors, Inc., which included this statement (CX 2054 A):

> "I asked him if Coors dictated the prices at which he could sell and he said not in so many words, but 'more or less the parent company tells him what price to sell at.' He said he could have only one price and that so far as he knew, he was the only wholesaler in Nevada selling us as a sub-wholesaler, that we bought some brands direct from the breweries, and that in Las Vegas the Coors distributors sold direct to Safeway Stores."

Mr. Johnston testified that B.D.I. was never able to get Coors beer back in Nevada after 1963. He stated that B.D.I. also had some operations in Arizona in which they had Coors beer for a period of years up until 1963 or 1964; that the

situation in Arizona was brought to the attention of the Coors officials who "expressed the view that they didn't like the central warehouse method of distribution" (Tr. 1197).

On cross-examination, Mr. Johnston testified that he was very much in hopes that the Coors Company loses on this issue of central warehousing in the present proceeding brought by the Federal Trade Commission; that he has had continual problems with the A.B.C. Board in California as to the legalities of B.D.I.'s operations; that B.D.I. has never been in the draft beer business; that he agreed that the brewery should have something to say about which package its distributors should handle; that the reason the Coors officials don't like the method of central warehousing is "Because they prefer the territorial type of distribution and are under pressure from the territorial distributors, have been over the years, to permit the territorial distributors to handle all accounts within these territorial boundaries" (Tr. 1233); that in California, Coors, Budweiser, Schlitz, Pabst, Miller's, National, Carling and Hamms are fair traded with the retail

[Part 2, p. 1031]

minimum price fixed by the brewer; and that B.D.I. has litigated with Anheuser-Busch, Falstaff, Hamm's and Olympia, but has never sued the Adolph Coors Company.

20. Robert Edward Laverty.

Robert Edward Laverty testified (Tr. 1262-1313) that he is president and chairman of the board of Thriftimart, Inc., which position he has held since 1968; that he has been associated actively with Thriftimart, Inc. since 1944; that Thriftimart, Inc. operates 79 retail stores, 86 cash-and-carry wholesale stores, and has 5 warehouses; that all of the retail stores have liquor licenses; that the stores buy Coors beer through the many Coors distributors who deliver its products to his stores; that Thriftimart has a central warehouse; that no delivery of Coors beer is made to the warehouse, and Thriftimart has never picked up Coors beer at any of the distributors' warehouses; that he does not know the current

cost of Coors, but thinks that a six-pack sells for $1.29; that, to the best of his knowledge, no Coors distributor has posted a delivered price at its warehouse (a "dock-delivered price") (Tr. 1264); that he recently found a "subdistributor", who was buying from distributors and selling at a dock-delivered price to customers picking up their own supplies; that in early 1972, when the breweries found out that they were buying from this subdistributor, they cut off or threatened to cut off delivery to the distributor, so "the distributor refused to sell to the subdistributor who was selling us the product" (Tr. 1265); that Thriftimart was continuing to buy from the distributor in February 1972, but that the subdistributor could no longer get Budweiser; that dock prices have always been lower than the store-delivered price; that Thriftimart does warehouse some beer, including Lucky Lager, Burgermeister, Spring, Brew 102, Regal, and several imported beers; that occasionally they obtained from subdistributors some Olympia, Budweiser, Michelob, Busch, Colt 45, and other malt liquors; that subsequently (on cross-examination) he listed Pabst in this group; that the beer is delivered from the Thriftimart warehouse by Thriftimart truck, together with delicatessen products and produce, and that the beer is rotated both in the warehouse and in the stores; that Thriftimart runs promotions on the beers that it handles through its own warehouse, a recent promotion of Burgermeister selling six for 99¢; that a quality control program for beer is handled through Thriftimart warehouse and supplies are dated as received and cans are code dated; that the beer is rotated as new stock comes in and the same procedure is followed in the retail stores;

[Part 2, p. 1032]

that Thriftimart's recommended shelf life for beer is 60 days; that in recent months Thriftimart has put restrictions on the activities of all delivery men from distributors; that in the case of beer, this independent activity led to overstocking of some beers and a shortage of others; that previously Thriftimart had trouble with beer that was getting stale and now the drivers are no longer allowed to rearrange the beer in the cooler; that, whether or not the beer is warehoused by

Thriftimart, it buys no more than a week to two weeks' supply at a time in order to insure inventory turnover and quality control; that the consumer would benefit from central warehousing and handling would be more economical even if Thriftimart paid the same price; that he estimated his company would save 10¢ to 12¢ a case if beer was delivered to the Thriftimart warehouse and then redelivered to the stores, assuming that Thriftimart would still pay the same price; that savings might not be reflected in beer prices "because all the national brand beer prices in the State of California are set by the wholesaler and not by the retailer", except private label beers (Tr. 1273-1274); that the savings realized through present warehousing arrangements can be passed to the consumer on other items. He testified that, with reference to Certified Grocers, a cooperative wholesaler, it [sic] central warehouses private label beer for distribution to its customers but it was unsuccessful in obtain other beers for this kind of distribution; that license difficulties were faced by Certified Grocers and also by Thriftimart; that he directed a cost study (CX 2030 A-E; Tr. 1275-1286); that the number of beer distributors has been declining in the last few years, a lot of beers going out of business, a lot of mergers, and some distributors have taken on multi-beer accounts; that, in his experience, "the brewery in every respect controls the distributor as to what price he wants to set and what he wants is eventually that the retailer has to sell it for" (Tr. 1284-1285); and that central warehousing of beer probably would have an adverse effect on private labels.

On cross-examination, Mr. Laverty testified that Thriftimart has a retail license but not a wholesale license in California. He stated that by central warehousing, he meant delivery of products by supplier to a central location that services individual stores; that there are advantages of having beer handled by a wholesaler who also handles other grocery products [sic] that Thriftimart is now doing a better job in controlling its beer inventory and handling all beers at its retail location; that Thriftimart had a tighter control on shelf life and he stated that he "insists that it all be turned

in 30 days and we have no more than two weeks' supply of beer on hand at any one time" (Tr. 1295); that he understood that Coors considered 60 days a reasonable shelf life for beer; that he did not think that his stores had any beer 60 days old, although he thinks that beer will hold for 60 days; that Thriftimart tries to do a better job than that but considers that the shelf life of beer is at least 60 days; that he doubted there was any appreciable difference between beer that was 30 days old and beer that was 60 days old; that, when beer is packaged, that's as good as it is ever going to be, and with each passing day it probably deteriorates in quality; that he doubted that any person can tell the difference between beer on the shelf for 30 days and beer on the shelf for 60 days except by checking the dates on the bottles; that Coors formerly did not get the space it was entitled to in the Thriftimart coolers but, since Thriftimart changed its system, Coors gets most of the box; that Thriftimart now tries to correlate the percentage of shelf space with the volume of sales of a particular beer; that all the beer drivers, including Coors, overstocked at the Thriftimart stores; and that, since the Thriftimart system has been changed, the shelf space for Coors in the sales area has been tripled.

21. Royal B. Irving.

Royal B. Irving, of Tucson, Arizona, testified (Tr. 1316-1372) that he is president of Coors Beer Distributors, Inc. There was received in evidence a document (CX 2446 A-B) containing remarks made by the witness at the United States Brewers Association convention in San Francisco, California, on February 9, 1965, which reads in part:

> "It is a good situation when a wholesaler can have a healthy and profitable business with handling just one brand of beer. I do point out, however, that a wholesaler cannot always survive on one brand alone. It is often necessary for him to take on an additional brand, or brands, or even merchandise unrelated to beer. His first consideration is to maintain a profitable operation. Lacking this he is of no use to his supplier, or suppliers. It should be mentioned here that in past years I have handled three brands of beer at one time.

"I will now discuss with you the matter of a wholesaler's franchised territory. This is a matter that can handled by the brewer itself. Each wholesaler

[Part 2, p. 1034]

has, or should have, a territory of definite boundaries, within which the wholesaler sells all of his product that is sold.

"One of the greatest threats to the independent beer wholesaler, is that of the rapidly expanding chain stores, that handle food and beer, and that establish a central warehouse from which they deliver beer to their various stores regardless of territorial franchises. This has the effect of drying up the market of a small wholesaler and giving this business to the wholesaler who is fortunate enough to be situated in the central buying area.

"This is a matter of slow strangulation for those wholesalers affected. These chain stores with their modern and up-to-date marketing techniques are gaining an increasingly large share of the package beer volume.

"This problem can be solved, because it has been solved by the brewer that my company represents, The Adolph Coors Company. When the majority of the Coors wholesalers in Arizona asked Coors to control and enforce their franchise agreements, Coors did so. This was not an easy thing to do. It required a lot of courage and intestinal fortitude on their part to get this done. The chain store principals were notified that wholesalers' franchises had to be respected and that Coors was not to be shipped from the central warehouse to stores in other wholesalers' franchised areas.

"You can imagine the uproar. The attitude of the chains was that when they bought the beer they should be allowed to send it to their stores within the state. The attitude of Coors was that this could not be allowed

inasmuch as their policy was to enforce franchise agreements. At any rate the problem was solved and the statewide chain stores now handle Coors and each store purchases from the local wholesaler. Granted that it took a year or two to get this matter settled, to the point that the chain stores would handle Coors; the point is that the policy was decided upon by the brewery and was carried out.

"In California one large grocery chain does not handle Coors in any of its stores for the reason that Coors will not allow them to distribute from a central warehouse.

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It is a deadlock, but the fact remains that Adolph Coors Company stand firm by their policy of protecting franchised territories. I have understood that some breweries go so far as to sell direct to the central warehouse, or buying agency, and cut out all wholesalers.

"It is my experience that central warehouse distribution, in the case of chain store set-ups, is very detrimental to the product itself. Beer is delivered in their own trucks, often by personnel inexperienced in handling beer and, as the saying goes 'who could care less'. In many instances the beer being delivered is stacked on top off [sic], or against, the beer already in the warehouse.

"Improper rotation is the result and the end-result of improper rotation is old and off-taste beer. You may well ask the question 'If this is the case why don't you have your salesmen check the stockrooms for old beer?' The answer is that where the beer comes from a central point the local wholesaler's salesmen are usually not allowed in the stockroom. Further, the salesman is not too interested inasmuch as he does not make a penny of commission on that account."

Coors strictly enforced in Arizona the policy set forth in the speech. Complaint counsel offered and there were received in evidence a number of documents produced by the witness which reflect the pricing structure of the company from 1968 through 1971 (CX 2447-2459, CX 2462-2472). The witness related the circumstances with reference thereto and the discussions and correspondence had with Coors' representatives. Although the Coors people made suggestions as to prices, there is no indication of coercion or undue influence on their part and the prices put into effect were the result of the distributor's own judgment.

On cross-examination, it was revealed that the witness had produced a document pursuant to subpoena of complaint counsel which had not been shown to the witness on direct examination, which set forth the total number of draft accounts in his marketing area, the total Coors exclusive draft accounts and the total Coors split accounts. The document was then offered by respondent and received in evidence (RX 1108 B) and showed that, as of January 1, 1972, Coors Beer Distributors, Inc. had 69 exclusive draft accounts and 119 split draft accounts. The witness testified that he had been a distributor

[Part 2, p. 1036]

for Coors for over 35 years; that Coors offered him the distributorship and he did not pay anything for the account; that the company is a family concern including daughters and sons-in-law. Mr. Irving testified that he is familiar with the termination provisions in his distributorship contract and that no member of the Coors Company has ever used them as a threat to him in any way in the operation of his Company (Tr. 1363); that he has in the neighborhood of three quarters of a million dollars invested, and that he certainly would not have made that investment if he were not assured that he would have a territory in which he would be the sole distributor of Coors beer (Tr. 1365); that he has a completely refrigerated warehouse, which he thinks is necessary to properly keep beer and his beer is delivered in insulated trucks (Tr. 1364). He testified (Tr. 1365-1366): "We discuss

the pricing with Coors, we discuss it among ourselves, we decide what price we should eventually come up with and we set that price." On the retail level, he testified (Tr. 1366): "Well, we believe that the retailer is entitled to a proper markup. As a matter of fact, the retailer group themselves comes up pretty well with the prices, although we will suggest that they get a markup of about a third."

When asked what he meant when he said that the chain stores pose some kind of threat, referred to in his San Francisco speech, he explained (Tr. 1367):

> "Well, what I mean is that central buying by chain stores and in the state of Arizona the central purchasing has been done in Phoenix, and the chain stores, chain store systems would send their trucks out to their stores in various parts of the state, and what I actually mean by that is that we lose the sale of beer in our market through the chain stores when they do that. It can be quite a quantity, as a matter of fact, the larger buyers would buy from that way and we would have a lot of smaller buyers left. It would be a real rough situation on a wholesaler and he would be left with many small accounts to handle and very few larger ones.
>
> * * *
>
> "It would very likely increase the prices as far as we are concerned."

[Part 2, p. 1037]

As to what happens to the product when it finds its way into a central warehouse, he said (Tr. 1368):

> "Well, when it is distributed from a central warehouse, it is put on trucks, sent to various stores throughout the state, unloaded without, I believe, proper regard to rotation. Beer that is already there is probably covered up, this has happened many times. I don't say it always happens, but I say this is one of the things about

central warehousing that is very detrimental to beer. Rotation is not handled and beer gets old and off-taste. We have gotten, and I am not saying right now, in the past when it was being done, complaints about old beer, off-taste beer, and many times when we trace it down it would come right out of a chain store, because its rotation and freshness is terribly important in the beer business."

He described his responsibility under the contract with Coors concerning the rotation of beer (Tr. 1368-1369):

"It is my responsibility to make sure that that beer does not get old, to make sure that it is rotated properly. When our delivery salesmen, our route salesmen go in, they pull the beer out that is already there, put in the beer they are delivering, then put the other beer back. We try very, very hard to keep our beer not over 60 days old.

* * *

"We pick the beer up and destroy it if it is too old, if it is over 90 days old. If it is around 60 days old, we will pick it up and exchange it and maybe a place that is moving beer real fast, we will get rid of that package, but we think that beer that is 60 to 90 days old should be taken off the market."

Mr. Irving testified that if the beer is destroyed, he bears the full expense (Tr. 1369).

[Part 2, p. 1038]

22. John Hemphill.

John Hemphill, who is a former Coors beer distributor located in Oakland, California, testified (Tr. 1373-1413) that he got the Coors distributorship in 1958 but prior to that had been selling other beers (Tr. 1377); that Coors assigned him a specific territory and he was told not to distribute Coors

outside his boundary (Tr. 1379); that from time to time during his distributorship he and the Coors people disucssed his Coors pricing starting in 1964 when Mr. Eke requested that he lower the price of the 24 eleven-ounce bottle (bar package) $.05 per case which Mr. Hemphill testified that he went along with because Mr. Eke was very diplomatic about it (Tr. 1380); the next discussion on pricing that he recalled was over quarter barrels in 1965 in which Coors stated that no such barrels would be shipped until the price for the product was established, and that the price should be with the rest of the California distributors which was at $8.50, and the price Coors recommended to him was $8.50, but the price he wanted was $9.00 (Tr. 1381-1382); the next price incident he testified to occurred in 1966 concerning seven-ounce can pricing (Tr. 1382). Mr. Hemphill testified that Coors gave the distributor a deadline of January 31, 1966, to reduce the price to $2.77 from $2.83 and to have the price posted (Tr. 1382). Hemphill testified he objected because he was always asking for a little bit more for the packages and consequently did not post the recommended price right away; that Coors representative Weaver came to the office and said he was tired of talking about prices and territorial restrictions with them and that if they didn't want to abide by the philosophy policies and recommendations of Coors the best thing for them is to not be a Coors distributor (Tr. 1382); that they did eventually post down to $2.77 prices (Tr. 1383). Mr. Hemphill testified that sometime in 1967 Coors representative Mr. Corder recommended that sales of beer from the distributor to the military base should be at the full posted price minus the state tax, but that which the distributorship had presented to the military base was lower (Tr. 1388); that Coors representative Corder in 1967 told him that he would have to choose between selling Pabst or Coors beer; that Coors gave him an opportunity to sell his business on the basis of 1/12 of the gross of the previous year as the good will value for the selling price of the business (Tr. 1389-1390).

[Part 2, p. 1039]

On cross examination Mr. Hemphill testified that his

Coors territory was the same one that another brewer had previously given to his partnership when they took on that brand in 1956 (Tr. 1391). He admitted that he operated outside the Coors territory continuously while he was a Coors distributor (Tr. 1392); that he knew when he signed his Coors contract that it contained a 30-day termination provision (Tr. 1393-1394); that Mr. Hemphill's primary function in the distributorship was the record-keeping function (Tr. 1396); that when he obtained the Coors distributorship he used the same territory for Coors that he had been using in the past for his Regal Distributorship (Tr. 1397); that the distributorship bought a warehouse site for speculation (Tr. 1404); that it was the policy of the distributorship that any of its employees that didn't want to comply with the policies and philosophies of it should look for another job (Tr. 1405); that he did not discuss the sale of his Coors distributorship on his own with any prospective purchaser until the day before he was terminated (Tr. 1408); that Coors had previously said that it had proposed buyers for it (Tr. 1408).

It should be noted that in the four instances concerning price discussions with Coors that Mr. Hemphill testified to, that in only one of those instances was there sufficient information in the record to determine what pricing decision was made, and in that instance he testified that Coors representative Eke was so diplomatic that he acquiesced in his recommendation.

The credibility of witness Hemphill is in question in light of pending legal proceedings he initiated in San Francisco against Coors (Tr. 1404), and in view of his demeanor and the general nature of his answers given during his testimony. Accordingly, the undersigned has determined that he can place little weight on the testimony of Mr. Hemphill in this matter.

23. Jay Thurman.

Jay Thurman testified (Tr. 1415-1477) that he is currently employed in an insurance consulting firm but that he was a former distributor of Coors Beer for the period

1968-1971 and that the name of his distributorship was Grand Mesa Distributing (Tr. 1417); that the principle [sic] officers in Grand Mesa Distributing Corp. were himself, his wife, and his mother (Tr. 1417); that he held the position of president of the company; that his contract

[Part 2, p. 1040]

contained provisions concerning territorial restrictions (Tr. 1420); that he was requested by a retailer outside his territory to sell Coors beer to him in 1969 (Tr. 1421); that he discussed this with a representative of Coors (Tr. 1423) named Richard Whipple and that Mr. Whipple told him not to sell the beer to that retailer under any circumstances (Tr. 1423); that his contract contained termination provisions of 5 to 30 days notice (Tr. 1424); that Coors representatives used the termination provisions to bring pressure on the distributorship (Tr. 1424); that his wholesale prices were determined on the basis of figures that his sales representative would furnish him (Tr. 1424, CX 2047); that the Coors representative would make out such a price sheet in his presence from a master sheet which included his pricing for other marketing areas in Colorado (Tr. 1428); that pricing sheets were given to him by his representative with a statement that this is your pricing (Tr. 1428); that he disagreed with these prices and told his representative that he wanted to change prices but that his representative said that any price changes would have to be approved by Mr. Straight at the brewery and he was a tough man to get an increase by (Tr. 1429); and that he was not free to set his own wholesale price (Tr. 1430); that sales representative Maurer of Coors told him that retailers must be kept in line on pricing and that Coors would not want price disparity to creep in and to notify him of price cutting if he found any going on (Tr. 1430-1431); that Coors would not allow him to discount to retailers (Tr. 1432); that he improved the condition of his distributorship while it was under his control and invested one-quarter of a million dollars in it, and by building a new facility (Tr. 1433); that Coors forced him to sell his distributorship (Tr. 1434-1435); that he sold his distributorship at a very substantial loss (Tr. 1435); that Coors would not permit him to

take part in negotiations of his distributorship (Tr. 1435); than in computing the sales price for the distributorship, Mr. Gorman stated that he would not allow any good will over 1/12 of some sales figure that he had not heard of (Tr. 1442). On cross-examination, Mr. Thurman stated that initially his father put up all the money when he bought the Coors distributorship (Tr. 1446); that he desired a written contract as a Coors distributor and that the territory provision and the territory used by the seller to him was satisfactory (Tr. 1455); that he was not aware that his contract contained 5 and 30 day termination provisions until six

[Part 2, p. 1041]

months after he was appointed a distributor (Tr. 1459-1460); that within his marketing area retailers pretty much followed his suggested retail pricing (Tr. 1466); that he attempted to borrow money from his retailers but that he did not know at that time that this was a violation of the Colorado liquor code (Tr. 1471).

The undersigned finds that in light of the general nature of the testimony given by Mr. Thurman and his demeanor in testifying, that there is a question of the credibility of the witness and accordingly finds that the testimony of the witness can be given little weight.

24. Glen Carskaddon.

Glen Carskaddon, of Fresno, California, testified (Tr. 1488-1509) that he is presently a wholesale beer distributor handling Olympia and Country Club Malt Liquor; that he has been actively engaged in the beer distributing business since 1947, and indirectly since 1934; that his father became a Coors franchiser in 1940, and he joined him in 1945; that they had a Coors territory that was limited to portions of Fresno, Madera County, California; that they never delivered outside of their area, and that he was not aware of any distributor ever coming into their territory to sell Coors beer. He stated that they sold Coors beer to approximately 90 draft accounts, of which 5 or 6 were split accounts; that he would

sell split accounts to draft retailers for about 30 days and then, at the end of that period, if they didn't go exclusive, they would pull the Coors beer out (Tr. 1492); that this was in keeping with the instructions that they received from the Coors representatives. He stated that in April of 1968 at a general distributors meeting in Sacramento, he met with Mr. Gorman and Mr. Straight and they thought on account of his age, that he should think of retiring and getting out of the business. As to his reaction to this suggestion, he said (Tr. 1495):

> "***I was just flabbergasted. I just couldn't understand why because of the increases. I thought we were doing a very fine, outstanding job in comparison to some of the other places. We were building our equipment. We were putting on new trucks, et cetera.
>
> * * *
>
> "Yes, I said, 'I don't care about selling.' "

[Part 2, p. 1042]

Subsequently he had a meeting with Coors' executives, stating (Tr. 1498-1499): "They pointed out, 'Sometimes, Glen, you can't straddle the fence because you might wind up with having nothing.' " He took the comment to mean (Tr. 1499): "Well, we don't have to sell you beer, and you might just as well be out in the cold and not receive anything for your business." He testified that he finally sold out to Ed Donaghy, but he could not recall the selling price; his attorney, who was on the board of directors, negotiated the price and settlement. On cross-examination, he explained that in draft beer accounts there is a problem with refrigeration that creeps up from time to time, that draft beer is much more of a difficult package to handle than the other packages; cleanliness is important, pressure at which the beer is drawn is a problem, and the substitution for brands in split accounts becomes a problem on occasion. He testified that he knew that Coors could terminate him for no cause whatsoever; that Coors did not choose to terminate him, but requested that he

find a buyer; that he had known Mr. Donaghy, to whom he sold the distributorship, for ten years, was very fond of him, and referred to him as his nephew; and that he went to Coors, suggested his name as the purchaser, and Coors said "Fine" (Tr. 1509). Mr. Donaghy is the present Coors distributor in Fresno.

25. Donald A. Jackson.

Donald A. Jackson, an attorney from Fresno, California, testified (Tr. 1509-1517) that his firm represented the Coors distributorship of Mr. and Mrs. Carskaddon for a number of years, and thereafter in 1961 he served on the board of directors; that he was trustee for a trust established by the Carskaddon's for their daughter which owned 20 per cent of the stock in Carskaddon Distributing Company; that he represented all of the parties to the distributorship and handled the negotiations in making the sale; that his first involvement with the sale related to getting the approval of a buyer; that Coors had initially indicated they had some buyers, but they did not come forward with any; that the Carskaddon's and he had proposed Mr. Donaghy as a buyer as early as May 1968. He stated that Mr. Donaghy submitted to the Coors people a letter relating to his financial ability to make the purchase and, after a number of meetings, around October 15, 1968 he was approved; the sale price was $319,000 for everything, exclusive of inventory; the equipment was $140,000 and good will $179,000. He stated that the price differed slightly from the figures suggested by Coors for good will (Tr. 1515).

[Part 2, p. 1043]

26. Peter Tinetti, Sr.

Peter Tinetti, Sr., of Merced, California, now retired, testified (Tr. 1518-1556) that he was a Coors distributor, doing business as Midstate Distributing Company, from 1952 to April of 1970, handling Global, Pabst, Eastside, Hamm's, Coors and Olympia beers; that in 1954 he took on Olympia beer after Coors beer; that on April 1, 1970, the time he sold

out, he was distributing only Coors and Olympia beers; that his contract with Coors restricted his territory to all of Merced and Mariposa Counties, and he had Madera County south on Highway 9 to Fairmeade, California; that he discussed these territorial restrictions with the Coors people and was told that "the lines are clearly set up" (Tr. 1520); that he never sold Coors outside this territory and was not aware of any other Coors distributor selling in this territory; that the wholesale prices for Coors beer were sent him by the brewery, and he just carried through with the prices they suggested; that, according to state laws, he was free to set his own wholesale prices, but Coors did not allow this; that after attending a meeting of area distributors in 1968, he asked for a ten cent price increase for the mountain areas but was told that the brewery wanted one price throughout the state. In this connection, CX 684 A-B, a report by Ken Hayes, a Coors representative, dated August 17, 1968, states in part:

> "A meeting was held by the area distributors and they have talked Pete, Sr. into charging 10 cents a case more in Mariposa County because of the distance and the mountainous area. It was explained that this would have to be okayed by the Adolph Coors Company; but that I could not see that it was feasible and that the other distributors were just trying to help themselves. It amounts to one route a week with round trip amounting to about 100 miles. Roads are good and total case sales throughout the year vary from 200 cases in winter to 325 cases during the summer plus keg business."

He stated that this report reflects what Mr. Hayes told him about the price increase in the mountains (Tr. 1523); that he made sales to military accounts in California at a price somewhat less than the civilian market, and was told by the Coors people that he had to go up to the civilian-market

[Part 2, p. 1044]

less the state tax (Tr. 1523); that Mr. Corder told him originally and, when Mr. Hayes came in, he was told again, and thereafter he raised the price (Tr. 1523); that he had

roughly 60 draft accounts in his area; that at one time he had about 45 split accounts; that the largest number of split accounts he had in the last few years was five; that in the last two or three years, they were all exclusive accounts; that in 1967 Mr. Hayes told him "to either get them [the split-draft accounts] exclusive Coors or get rid of them" (Tr. 1524); that he placed the Coors draft beer in taverns for a limited period of time, usually 30 days; that his Coors sales for the first three months in 1969 were 30,600 cases, and for the same period in 1970 were 45,600 cases, and that, compared to the state-wide sales in California of Coors beer, this was above the state-wide average; that on March 13, 1969 he attended a meeting with Mr. Corder, Mr. Hayes and Mr. Gorman in Denver, which was the first time the subject of selling his distributorship came up; that they told him he "didn't have the Coors image" in his area, and that Mr. Corder had said that he "could not serve two masters" meaning that the witness also had Olympia beer along with Coors beer (Tr. 1527-28). With regard to dual distributorships, he testified (Tr. 1528):

> "At that time, they had a blackboard up in the meeting room, and there was a chart on it, but I believe either Mr. Gorman or Mr. Kerr made it. It showed one brewery to a distributor to a retailer as being a perfect Coors distributorship, a strong Coors distributorship. The second chart showed a distributor having two beers subsequently selling to the retailers as a poor distributorship."

He stated that thereafter he did offer to split them as an alternative to sale. He testified (Tr. 1529-1530):

> "I offered to split the two brands and put up a warehouse to suit whatever they wanted. I said that I would put on as many men and many trucks as they saw fit. I added, 'within reason,' that I didn't want to lose money, and that I would either put my son in charge of the Coors or keep it myself and give whoever was left the Olympia distributorship.

"They said that would not change the situation, that they still wanted one owner, a new owner."

He stated that at a meeting in 1969 with Mr. Hayes and Mr. Arnold of Coors, "they were dissatisfied with what I came up with and told me that I would have to find a buyer or they would find a buyer, and I offered to sell out to two of the men who worked for me, but they did not have enough money to come up with the purchase price, so I felt I should have controlling interest in it until they paid it off, and they wouldn't go for that" (Tr. 1530); that he was free to select a buyer, but he sold the distributorship to Robert Scarpitto, one of the two men sent by Coors (Tr. 1531); that at a meeting with Mr. Scarpitto and his attorney and Mr. Hayes, the selling price for good will was discussed and "They said the one-twelfth agreement that had gone on throughout the state on sales of this nature was one-twelfth of the gross and that would be satisfactory" (Tr. 1531); that he did not feel this was a fair figure but was afraid to raise the price because of a fear of termination, stating (Tr. 1532):

"Well, I saw what happened to some of the distributors, maybe Orth & Hemphill. They just took the brand away from them without giving them a chance to sell, and I didn't want that to happen to me. It is better to have a little bit than nothing."

He testified that he attended a general meeting of all the distributors from 11 states in Golden or in Denver where pricing was discussed, at which time it was stated that "they didn't want any chiseling, any underhanded deals" which he understood to mean varying from the price that was set, the posted price; when asked that, if he had reposted at a price other than Coors' price, it would be chiseling, he testified (Tr. 1533): "It might be, to their way of thinking. Legally, it would not be chiseling."

On cross-examination, he testified that, when he acquired Coors in 1952, he also had Pabst, Global and Eastside draft;

that he took on Olympia in 1954, and that no Coors' representative told him not to take on Olympia;

[Part 2, p. 1046]

that, when he signed the contract with the Coors Company, he knew that it had a five- and thirty-day termination provision in it; that, at Coors' request, he called on all, roughly 450, retailers in his area, and that, of that number, he had "Upwards of 400", some accounts being exclusive (Tr. 1536); that his responsibilities as a Coors distributor in his territory were "To see that I got all possible coverage, all possible placement, that the beer was treated properly, and to sell as much as I possibly could" (Tr. 1536); that he had full responsibility for rotation in his territory and for the condition of the product; that the report of Mr. Hayes (CX 684 A-B) was in error when it said they "have talked Pete, Sr. into charging 10 cents a case more" because they didn't talk him into charging, but only into trying to charge 10 cents a case more (Tr. 1540); that, with regard to the military pricing situation, although Mr. Corder and then Mr. Hayes had told him to change his price, he did not do so immediately, but "shortly after, I think, when Mr. Hayes insisted" (Tr. 1540-1541); that he then put into effect Mr. Hayes' suggestion that "military prices should be the same as everyone else's less tax" (Tr. 1541); that he had problems in his distributorship with draft beer; that draft beer is a "teasy item" to handle, meaning that it is not pasteurized and must be kept under refrigeration, since otherwise secondary firmentation [sic] takes place sometimes and spoils the product; that draft beer has the problem of age so rotation is critical; that draft beer has to be kept under constant pressure and that Coors beer draws at a higher pressure than most other beers; that sanitary conditions are a problem with draft beer and he had to send his own men around to clean all the outlets, the hoses, the taps and faucets about every ten days, although the Coors representatives had suggested that every week would be better. In this regard, he testified (Tr. 1544):

"A. They felt that every week would be better suited.

* * *

"Q. Did you disregard their suggestions in this area?

"A. We checked a lot of these accounts and found that there was nothing wrong with taking care of them every ten days to two weeks.

[Part 2, p. 1047]

"Q. In your opinion?

"A. Yes, sir, the beer tasted proper, the hoses were not all gummed up, nor were the faucets.

"Q. And in this manner, you disregarded the Coors representative's suggestions?

"A. To that extent, I might have. Yes, sir."

He stated the same draft-cleaning man would make a route and clean both the Olympia and Coors facilities; that the cleanliness of the serving glasses in the retailers' places was a constant problem and had to be checked; that the Coors representatives checked glasses in retail accounts on many occasions and, when they found dirty accounts, they would report that to him and he "would follow right through" (Tr. 1546); that the Coors Company did give him a chance to sell; that he paid nothing for the Coors franchise and, at the time he took it on, it wasn't worth handling, but he thought it had possibilities, it gave him another product, and "Saleswise, they had a very good beer, but sales-wise they just didn't have the public acceptance at the time" (Tr. 1547). He admitted that the prime purpose of the meeting on March 13, 1969 was marketing and did not have anything to do with dual distribution (Tr. 1547); that his son, whom he proposed to head up the Coors operation if Coors had permitted him to split it, was just a general handy man prior to the time he sold his Coors operation; that he "didn't intend to divest myself of Olympia" (Tr. 1549), but he would run whichever one (Olympia or Coors) the Coors people wanted him to; that

the night before the sale was terminated with Mr. Scarpitto, he called Mr. Corder up, and in this connection the following exchange took place (Tr. 1550-1551):

"Q. Stating that you would do what?

"A. Stating that I would go with the Coors and divest myself of the Olympia. I knew it was too late to do anything, but I just wanted to get his reaction, and he stated, 'You know this is what we wanted you to do, but it's too late now. Why have you made up your mind to do it at this point?' I told him that the Coors

[Part 2, p. 1048]

sales were going up, and the Oly. pia sales were leveling off, and that for this reason, but my main reason for the call was to get his reaction which I did and got just the answer I wanted, that had I thrown out the Ole, I could have been a Coors distributor.

"Q. As a matter of fact, you told Mr. Corder you made a mistake, didn't you?

"A. Yes, sir, I did.

"Q. And as it turned out, in fact, you did make a mistake, didn't you?

"A. Well, sales-wise, money-wise, yes, sir.

"Q. You made a wrong decision?

"A. Yes, sir."

He testified further concerning Orth & Hemphill (Tr. 1551-1553):

"Q. Now, I think, you stated when you discussed good will you saw what had happened to Orth &

Hemphill. Do you recall that statement on direct examination?

"A. Yes, sir.

"Q. What happened to Orth & Hemphill?

"A. The beer was yanked from him. He wasn't even allowed to sell anything, the brand, or whatever.

"Q. You don't have any idea what he turned down, do you?

"A. No, sir.

"Q. And as a matter of fact, he could have turned down a very, very fair price, couldn't he?

"A. It could be.

[Part 2, p. 1049]

"Q. And if such were the case, then, your testimony, as for it being yanked away, would be an erroneous statement, wouldn't that be correct?

"A. Well, he felt like I did, that he could hold off and that the Coors people would not make a move, and he was proven wrong subsequently.

"Q. Is there an attitude that prevails among distributors, that they can wait and wait and delay, and that the Coors Company won't do anything about it?

"A. All this is dependent upon activities and sales, sir, if the sales are satisfactory and the box positions are satisfactory, I don't see why the change should be made.

"Q. You will agree that there is a lot to a distributorship besides sales, wouldn't you?

"A. Oh, yes, sir.

"Q. Let's get back to Mr. Orth, and I don't think you answered my previous question. Let me ask it for you again. Is there a feeling that it is fairly wide spread among the Coors distributors that Coors moves very, very slowly, and they really don't get in a hurry about doing anything as far as the distributors are concerned in the way of enforcing certain standards that they have and that type of thing?

"A. They don't chop you off immediately.

"Q. As a matter of fact, sometimes they will go to the end of the world with you, won't they?

"A. To get their desires, yes, to get what they wish.

"Q. As a matter of fact, don't you really know, Mr. Tinetti, of Coors distributors who the Coors Company should have done something about years and years and years prior to the time that they did?

"A. There are some, yes, sir."

[Part 2, p. 1050]

He stated that he thought Mr. Barnhardt had made the speech on "chiseling" and "underhanded deals" at the Denver meeting; that these words have a particular meaning in the brewing industry and that this practice is fairly common among some distributors; that he has known of some instances among the Coors distributors, but he has never known any instance where, if the Coors representatives found out about it, they didn't take some kind of action (Tr. 1553-1554); that Coors has a fanatical attitude on law enforcement, demanding strict obedience to every state, federal law and local state regulation; that the breweries post the retail prices of beer in California pursuant to the fair-trade laws of California; that he posted his own wholesale prices in

the counties which he markets; that from time to time Coors Company had made suggestions as to what his wholesale prices should be, Coors also having the right to fair trade at the wholesale level in California; that when he first took on both Coors and Olympia, Olympia was by far the stronger brand and continued to be for years, stating (Tr. 1555): "It was the Olympia Beer that was paying the tab on running the business." He added that Olympia beer is not pasteurized and requires the same treatment as Coors (Tr. 1556).

27. Robert Glen Dixon.

Robert Glen Dixon, of Del Rio, Texas, a former Coors distributor, doing business as Del Rio Distributors, Incorporated, and marketing in ten counties (selling beer in only eight since two counties are dry), testified (Tr. 1558-1607) that he became a Coors distributor officially in 1969 when John Reynolds and he bought out Mr. Gonzales; that he was associated financially with the Del Rio distributorship before 1969 when he financed Mr. Reynolds in his part of the distributorship with Mr. Gonzales; that Mr. Reynolds and he then owned the business fifty-fifty when they bought out Mr. Gonzales and Mr. Reynolds was president of the company; that he thereafter bought out Mr. Reynolds because "the business was in bad financial status, and, too, there wasn't enough for both of us to stay there and operate it, and the indebtedness was so great I had to take it over and furnish the money, so I just bought Mr. Reynolds out" (Tr. 1561); that, when he became sole owner and president in May, 1969, he was selling approximately seven or eight thousand cases of beer a month, and thirty to thirty-five half barrels a month; that, when his distributorship ended

[Part 2, p. 1051]

on November 30, 1971, his sales of Coors beer in the month of November were over 19,000 cases and 160 barrels, and he had 82 per cent of the draft beer business in his territory at that time; that he sold his business in November 1971 to Mr. Ware and Mr. Foster, who had been approved by Coors, for $193,000 but has only been paid $100,000, although he

thought it was worth $300,000 (Tr. 1563); that, when they bought out Mr. Gonzales, the beer business was bad, but in September of 1969 the distributorship first became profitable "and gradually got better all along" (Tr. 1564). He testified as follows regarding a situation which arose early in 1969 involving the Piggly Wiggly Company (Tr. 1564-1565):

> "Well, Piggly Wiggly was the best dealer I had and they ran specials and they ran specials on everything in the store and they ran specials on Coors beer. However, they paid the regular price that everybody else paid to me, but I had talked with them several different times and about their specials and they said it was a drawing card for their business and they were willing to lose money on the beer so they could get customers into the store. So, then I was approached by Mr. Linn [Mr. Mel Linn, a Coors representative] about this situation of specials, and Mel told me that he would come down and talk to Piggly Wiggly, which I made an appointment with Mr. Don Summar. We had an appointment in my store, in my office, and we visited a little while and Mr. Linn mentioned to him about the specials and he told him that he run everything special in the store and that he paid for the bill. He felt like it was his beer, he could do anything he wanted to do with it. He could either sell it, pour it out or do anything he wanted to do with it. And he got real upset about it and said some very nasty things, and got upset.
>
> * * *
>
> "Yes, Mr. Summar left, and then I asked Mr. Linn what we would do in that situation. He said, well, of course, he was kind of upset, too, he said, 'Well, we just won't sell them any beer.' And I said, 'Well, he is a good customer of mine. What position would that

[Part 2, 1052]

> put me in if I didn't sell him beer?' He said, 'We can just keep cutting down on beer. You won't get that much

beer to sell, because we don't have the beer to sell on a special like that.' And they evidently did because I didn't get any beer."

In spite of what Mr. Linn had told him, the witness stated that he continued selling to Piggly Wiggly after this because "they were good customers and I just didn't want to cut them off" (Tr. 1566). He testified that at this time his business had begun to pick up and he wasn't losing money right at that point, although the business had lost $82,000 up to that point. He testified as follows regarding another situation with Piggly Wiggly in April 1971 (Tr. 1566-1567):

"A. Mr. Hayes was the new man in the territory. He came into the territory and I don't know exactly the date, I believe it was sometime in April in '71, I believe it was, and they were still selling the beer. They didn't sell beer every week; they would have weeks they didn't and they would run it on special.

"Q. This is Piggly Wiggly?

"A. Piggly Wiggly we are talking about, and, also, Food Way run it on special, so Mr. Hayes and I went up to talk to, they have a new manager now at Piggly Wiggly and his name is Fred Van Winkle. Mr. Hayes and I went up and met Mr. Fred Van Winkle in the store and we visited a little while, and Mr. Hayes mentioned something about the specials they had been running, and he told them he made some more expensive things than beer in the store and he was going to run this special as long as he bought beer from Dixon, our Coors, and he got rather upset and just walked off and left us standing there.

"Then we went across the street to Food Way and Mr. James Porter is the manager over there, and we visited a while, I made an appointment with Mr. Porter and we visited for a little while, and then Mr. Porter, he

[Part 2, p. 1053]

> mentioned about the specials, and Porter told him he had gotten a lot of business by having the Coors beer and running it as a special. Mr. Hayes then mentioned that Coors preferred not to run their beer on special, so for them to sell it at a profitable price."

When he asked Mr. Hayes what he could do about the situation, Mr. Hayes told him, "If you just don't sell them any beer he would not continue running it * * * we could just not deliver them any beer, we don't have enough for them running specials like this" (Tr. 1568); he stated that he told Mr. Hayes, "He is doing to continue running it as long as I sell him beer" (Tr. 1568); with regard to a possible lawsuit, the witness testified (Tr. 1569):

> "I mentioned to Mr. Hayes if I didn't deliver beer, it was my understanding that Piggly Wiggly or Food Mart could sue me for not delivering beer and if I have beer in my warehouse it is my understanding that I have to deliver beer to my customers who had a license to buy beer."

The witness also stated that he had a discussion with Mr. Hayes concerning a tax change and testified (Tr. 1569):

> "A. Yes. We had a tax change and everybody in Texas was having to change prices. He came by with the suggested prices and in the discussion we come up with the draft beer situation, and at that time I was getting, before that time I had been getting eighteen fifty and I had gone up just for a check to see what it would be if I went to nineteen fifty. I went up a dollar a barrel.
>
> "Q. You actually put into effect the price of $19.50?
>
> "A. Yes, sir. So I went to $19.50, and Mr. Hayes wanted to know if I read my contract. He said,

> 'You can't go up on your beer without advising Coors of the situation.' I said, well, I have gone back down, anyway. So I said, 'I went back down to $18.50.' But he felt like I should have discussed it with Coors before I did go up on the price. It only lasted about a week."

[Part 2, p. 1054]

He testified that his contract "reads that before you change your prices, I believe that is the way it reads, that you go over it with Coors, talk with Coors about it" (Tr. 1570); that he had never before priced his beer differently from Coors' suggestions before that date; that Coors' representative, Mr. Linn, had told him that Coors' policy is not to give deals and discounts, that he would only sell in the territory to which he was assigned, and, if he sold outside his territory, Mr. Linn told him "we would be on the next plane to Golden to take it up with the authorities" and "I would lose my distributorship" (Tr. 1571); that there was one illegal sale of 50 cases of Coors beer outside his territory when an employee, Ike Townsend, arranged to have it delivered to a warehouse in Crystal City, which is his territory, but the buyer had then taken the beer to Austin where his son had a barbecue stand and sold it; that Austin was in his territory, but it wasn't in the place where his license was and that was where he was cited by the Liquor Control Board for selling beer since under Texas laws it is necessary to deliver to the place where the license is (Tr. 1572); that he has sold some beer to retailers who took the beer outside his territory by giving them a manifest which permits them, under Texas law, to take beer from the warehouse outside of his territory (Tr. 1573); that he did not discuss with the Coors people these sales to retailers at his warehouse when he gave them manifests until the situation arose about selling his business; that, on May 1, 1971, he had a meeting in Dallas with Messrs. Linn, Hayes and Kersen, at which time Mr. Linn told him that "they felt like I wasn't doing the job that they would like for me to do down there and he was going to get me a letter out within 30 days giving me 90 days to straighten it up" because "some old beer was in the territory and that I

wasn't giving them the service and had some turnover in my employment" (Tr. 1575); that thereafter he received a letter (CX 2477 A-B), dated May 5, 1971, from the Adolph Coors Company, signed by Melvin C. Linn, placing him on a three-month probationary period "within which you must bring your operations up to the standards satisfactory to Adolph Coors Company"; that in August 1971 he had a meeting in Golden with Harvey Gorman, Mel Linn, Ken Hayes and Leo Bradley, in order "to discuss with him the lack of improvement in his operation during the three month probation period which ended August 5th" (CX 924); at that time Mr. Gorman said that his distributorship had

[Part 2, p. 1055]

not been improved in accordance with their letter of May 5, 1971 and he was asked to sell his distributorship (Tr. 1577); also, at that meeting, Mr. Hayes mentioned a sale by the witness in Johnson City outside his territory; that thereafter he received a letter (CX 2478 A-B), dated August 17, 1971, from the Adolph Coors Company, signed by Harvey V. Gorman, giving him notice of termination, which states in part:

> "The Agreement is being terminated for many causes, among them being the following:
>
> 1. Unsatisfactory draught service and maintenance.
>
> 2. Poor rotation in your area.
>
> 3. No efforts to build a good organization.
>
> 4. Poor service.
>
> "It has nothing to do with our decision; however, we note with interest you will shortly receive from the Texas Alcoholic Beverage Commission a three-day suspension for violation of Texas laws.

> "In our probationary letter to you dated May 5, 1971, you were advised you would be given a reasonable time to sell the distributorship if your performance remained unsatisfactory. This commitment on our part shall expire on November 1, 1971."

With regard to the above, the witness testified that he "was giving the best draft and the best sales there were"; that there was not poor rotation in his area; that he had made every "effort I could possibly to build a good organization, and I thought I had a good organization according to the increase to what we had been selling"; that he was giving good service (Tr. 1580-1582); that he thought he was terminated "For selling beer out of my, this beer that went into other, some other territories and because they [Piggly Wiggly] were running beer on special" and it was beyond his control if he kept them as a customer (Tr. 1582).

[Part 2, p. 1056)

On cross-examination, he testified that Coors beer came for the first time to Del Rio, Texas, in December 1966 and also to San Angelo, Dallas, Forth [sic] Worth and Wichita Falls about the same time; that the Coors Company did not have production enough for those areas of Texas until 1966; that, when Mr. Gonzales and Mr. Reynolds owned the Del Rio, he had a financial interest in it through Mr. Reynolds, who owned 49 percent of the stock and he had financed Mr. Reynolds in his partnership with Mr. Gonzales; that Mr. Reynolds and he bought out Mr. Gonzales but he furnished the money; that the Coors Company knew that they were buying out Mr. Gonzales and did not object; that he was in the drilling business and pump business when he first started to back Mr. Reynolds and his first experience with the beer business was when he furnished some money to Mr. Reynolds (Tr. 1587); that he had other people running his drilling business, pump business and shopping center business, but he moved to Del Rio and took over the distributorship and operated the trucks (Tr. 1588); that he devoted his full time to the distributorship after May 1969 (Tr. 1588); that he did not pay Mr. Reynolds any money for his part of the business

because he had signed the notes of indebtedness for the distributorship and furnished the money (Tr. 1589); that, when he bought out Mr. Reynolds, he assumed the building and the trucks and the indebtedness (Tr. 1589); that in 1971 the distributorship was worth $300,000; that the record is not clear as to how he arrived at this figure; that, during the meeting with Mr. Hayes and the Piggly Wiggly manager, Mr. Hayes stated that the Coors Company wanted retailers to make a fair rate of return on their investment (Tr. 1593); that Mr. Hayes talked with him after he raised the price for half barrels from $18.50 to $19.50 because his competitors did it; that he paid $13.50 for the half barrels; that the Coors representatives complained to him about his rotation policies, the conditions of some of his draft accounts, that he was not devoting full time to the business, some of the service he was giving his retailers, the condition of his warehouse, and some of his violations of the Texas liquor laws; that he was suspended three days on one occasion and eight days on another occasion when he was late in paying for his license; that, during the eight-day period, Mr. Richard Mirlow, of Fort Stockton, a Coors distributor, delivered beer to his customers; that these suspensions were not the fault of the Coors Company; that in the letter to him from the Adolph Coors Company, dated May 5, 1971 (CX 2477 A-B), he was told that the sales price, or the contract or

[Part 2, p. 1057]

the agreement between him and the buyer, if in fact he didn't get by his probationary period, would be entirely up to him (Tr. 1600); that he negotiated the sale on his business and subsequently entered into a contract and that the Coors Company did not take any part in that contract; that he contracted to sell the business for $193,000 and the Coors Company stayed away and let him handle the whole thing himself; that he accepted $100,000 from the buyers, Mr. Foster and Mr. Ware, because of his creditors, and the Coors Company had nothing to do with that transaction (Tr. 1603); that although he knew there were shortages from time to time for Coors beer going into his area, he told the Coors Company he would like to have another county closer to him

in his territory, but Coors said they were not opening up any new territory on account of the shortage of beer (Tr. 1606); that he never checked on the age of the beer he sold outside his territory and no regular calling program for doing so (Tr. 1607).

28. John A. Fletcher.

Mr. Fletcher testified (Tr. 1613-1636) that he is a buyer for Lucky Stores (supermarket business) in San Leandro, California (Tr. 1614); that he is buyer of beverages, tobaccos, deli, and liquids (Tr. 1614); that he is a purchaser of beer from Beverage Distributing Inc.; that Lucky Stores has central delivery of other brands than from Beverage Distributing Inc. (Tr. 1617); that there are definite advantages in central warehouse delivery to Lucky Stores in lower consumer prices, better product control, control of pilferage problems, delivery control and quality control of beer (Tr. 1617-1620); that Lucky Stores under central warehousing can deliver cheaper due to the fact of volume merchandise (Tr. 1622).

Under cross-examination he admitted that he obtained central warehoused products that cost less than he can buy from regular distributors and that if he couldn't get them at a reduced cost he wouldn't centrally warehouse them (Tr. 1627); that to a degree he had to obtain a price break on purchases in order to pay for the distribution out of the central warehouse (Tr. 1627); that his only purpose in central warehousing is to service his own stores (Tr. 1630); that central warehousing has no effect whatsoever on the price of beer in California because that is set by the manufacturer (Tr. 1632); that he believes he has better control over stock rotation under central warehousing but he does not know of the success or failure of the stock rotation in his stores of Coors products (Tr. 1633-1634); that he could not make a comparison of distribution costs of Coors distributors compared to his central warehouse (Tr. 1635-1636).

[Part 2, p. 1058]

Proceeding now to respondent's witnesses (42 in number) short summations of portions of their testimony is similarly set forth.

1. Harvey Gorman.

Mr. Harvey Gorman was called for the limited purpose of identifying respondent's RX 1047, the policy brochure (Tr. 1738). He stated that even though the policy was dated November, 1971, it was in fact the policy of long-standing and was merely printed in this form so as to be an aid to younger distributors (Tr. 1738).

2. Raymond Willie, Jr.

Raymond Willie, Jr., testified (Tr. 1741-1767) that he is president of Willowbrook, Inc. of Dallas, Texas, a Coors distributor; that his territory is Dallas, Kaufman, Ellis and Hunt Counties, Texas; that they were appointed the Coors distributor some time the latter part of May 1966 after making application in August 1965 by writing a letter to Mr. L. R. Straight, at that time general sales manager of Coors Company; that their first date of operation was August 29, 1966; that he did not pay anything for the Coors distributorship; that in 1971 they sold around 235,000 barrels of Coors beer; that, besides the policy manual, draft manual and advertising or merchandising manual, they receive update sheets from time to time from the local sales representative, letters and bulletins concerning the operation of their distributorship; that their contract with the Adolph Coors Company is in writing and specifies his territory; that sometimes they had a shortage of beer; that he would not have contracted with the Adolph Coors Company had he not known it was their general policy to have only one distributor in a given area; that they would not have invested the kind of money that they had to invest had they thought that there would be another Coors distributor in the territory; that they set their sales prices; that the retailers set their prices; that it's a very common situation in their territory for Coors beer at the retail level to be sold at discount prices; that prices of Coors beer at reduced rates are advertised by retailers in publications in Dallas in the newspapers at below his suggested retail prices; that his policy concerning exclusive draft accounts in his distributorship is that he will split with foreign beer or dark beer, "We will split with those two" (Tr. 1747); that they stopped splitting with the domestic beers in their market after

[Part 2, p. 1059]

a very short time when they saw it was unfair to the consumer and to them (Tr. 1747); that they have never threatened to cut off any retailer that didn't adhere to their suggested prices, nor have they threatened them with no deliveries if they didn't maintain the prices that they suggested; that they have never been threatened as a distributor with termination of their distributorship if they didn't observe territorial boundaries; that they never have been threatened with termination of their distributorship because of their split draft account policy; that they have never been threatened with termination of their distributorship if they did not sell to a central warehouse; that they have never been threatened or coerced or intimated [sic] in any way by the Adolph Coors Company or any of its agents (Tr. 1748); that he recalled his earlier testimony concerning a 10¢ a case promotion that he was reported to have had with a certain sector of the Dallas community, the Negro sector, and that it did not take place; he stated, however, "We did fulfill the part where we advertised Coors beer, their ads, in the paper Sepia" (Tr. 1750). On cross-examination, the witness testified that they are now starting on a program to change their delivery operation so far as delivery truck equipment is concerned, and have ordered the first of a series of completely refrigerated package delivery trucks in order to complete the Coors refrigerated marketing program and "because it is going to improve the taste of Coors beer" (Tr. 1750); that Mr. Bradley or the local sales representative contacted him regarding a file kept by him from the beginning of his distributorship containing Thursday and Friday newspapers in which the retailers advertise beer at discount, and he furnished the file to him (Tr. 1751); that they had a serious organization problem in their company about which he testified (Tr. 1754):

> "I don't feel that we were intimidated. I don't think we were threatened. I think they sat down with us. It was very serious to them and it was serious to us and they wanted to get this problem in our organization, which was an organizational problem – a conflict of personalities – and they wanted to help us get this

problem straightened out. They laid out a time schedule. They laid out some things they wanted us to do."

He stated that thereafter they were on probation, with the local sales representative making a report to the Coors

[Part 2, p. 1060]

sales committee, which "would be a full year of complete evaluation as to how we were progressing" (Tr. 1755); however, they did show the expected progress and worked out their problems; that poor rotation was called to their attention and old keg beer was brought to their attention and they corrected it immediately (Tr. 1757); that they had a retailer complaint from a Mr. Smith because the route salesman had refused to give him the number of cases he requested (records would indicate that he would sell this in about two months) and at that particular time they wanted their retailers to carry about a five to seven day working inventory; that their supervisor, Jerry Davis, went out to see Mr. Smith but "he threatened Mr. Davis with his life, said he was going to kill him, to get out of his store" and then called someone at the brewery and said they would not sell him enough beer and he demanded some action (Tr. 1760); that thereafter Mr. Linn and he went to see Mr. Smith and explained their policy and "it was all right" and it was decided that in the future "our sales manager would go out, and personally go out and see the account rather than leaving our supervisor to take care of it" (Tr. 1762).

On redirect examination, he testified with regard to TX 659 through 689, advertisements of sales of Miller's, Budweiser, Schlitz and Coors beer which appeared in the Dallas Times Herald. When asked by complaint counsel, he identified the size cans not stated in the advertisements as follows: RX 659, 660 and 676 all advertise six-pack cans of the four different brands and they are 12-ounce cans; RX 677 advertises only Coors 6 Tab Open Cans which are 12-ounce cans. He stated that the 12-ounce can is the only can you can sell in the State of Texas, a 15-ounce or 16-ounce or 7-ounce can not being permissible.

3. Mrs. Myrtle Bard.

Mrs. Myrtle Bard, of San Bernardino, California, testified (Tr. 1769-1782) that she is president and treasurer of the Bard Distributing Company, a Coors distributor; they had their first shipment in 1933; that her operation sold six million dollars of beer in 1971; that her contract with Adolph Coors Company is written and her territory is specified therein; that, during the past four or five years, she has not been short of Coors beer until this last year and that's the first time she ever had a problem; that she sets the prices; that she has never been threatened or coerced or intimated [sic] in any way by any member of the Adolph Coors Company; that her territory was Indio and Yucca Valley and San Bernardino, her main headquarters; that she recently sold Indio and Yucca Valley because she wanted to get out of such a large territory; that

[Part 2, p. 1061]

she asked Coors to find her a buyer and they did, two gentlemen, to whom she sold Indio and Yucca Valley territory; that Coors Company dictated absolutely nothing on the sale and the entire transaction was her desire and on her terms (Tr. 1773). On cross-examination, she testified that her investment today is a little over two million dollars and her business is profitable; that her total sales in dollars in 1971 were six million, and in 1970 were "five million something" (Tr. 1774); that her net profit before taxes in 1971 was approximately $365,000, and in 1970 was about $268,000 before taxes; that she has been increasing her investment every year in her distributorship in the last ten years; that she sold the Indio and Yucca Valley areas on November 15, 1971 and this sale was included in the six million dollar sales referred to above and also in the profits; that her husband handled several beers, Pabst, Schlitz and 102; that she handled Falstaff but stopped in 1960; that in 1960 Falstaff was about 12% of the sales of Coors; that she had been approached within the last five years to distribute other brands of beer but wasn't interested; that Coors is a quality beer which contributes to its sales; that she didn't believe that a decrease

in sales would occur if she increased her wholesale price by a nickel a case for 12-ounch cans in California; that Budweiser, Schlitz and Olympia beers are her principal competitors in California, but she did not know about their pricing or their advertised sales; that California is a Fair-Trade State and all of her prices are posted with the Secretary; that she is a member of the California Beer Wholesalers Association to which most all the distributors belong; that she sells Coors beer to anyone who wants Coors beer as long as the account wishes; that she would say that Coors beer has the largest share of the market in the San Bernardino area but she did not know the percentage. On redirect examination, she testified that, although Coors is the only beer she sells now, the physical plant is such that she could distribute out of there another type of beer if she so desired (Tr. 1781); that she has about eight hundred retail customers in her area in San Bernardino at the present time, of which a hundred eight or nine are draft accounts and she was sure she had split accounts but did not know how many since she doesn't call on the trade (Tr. 1782).

4. Kenneth Adamson.

Kenneth Adamson, whose business address is Sacramento, California, testified (Tr. 1783-1825) that he is part owner, vice-president and general manager of the L&M Foster Company, Incorporated, doing business as the Foster Company, a Coors distributor, since November 23, 1970; that from March 15, 1963, he was sales manager for Mr. Vincent J. Domenico, a

[Part 2, p. 1062]

Coors distributor in Lakewood, Colorado; that, to his knowledge, the Foster Company did not pay for its distributorship; that he is familiar with the Coors policy manual, RX 1047-A, and they have a draft beer manual "that helps us in the distribution and quality control of our draft beer and we have a merchandising manual that assists us in our market area, placement and servicing of large types of advertising in California" and are periodically brought up to date on new packaging through correspondence with the brewery and with

the brewery representatives (Tr. 1784-1785); that they have meetings from time to time with the sales representatives when they call on his territory and also group meetings that usually include generally the introduction of a new package, new type of advertising, recycle programs, labor difficulties, etc. (Tr. 1785); that he knows all the executive officers with the Adolph Coors Company and they have a draft service man that calls on their operation and assists their draft people in bringing things up to date, pressure changes, types of installations, new ideas to try to assist the accounts in building volume, regarding cleanliness, etc., and they also have the merchandising representative who works with their merchandiser, assists them in the placement and ideas concerning their advertising point of sale material (Tr. 1785); that they have a written contract with Adolph Coors Company which specifies their territory; that their territory is Sacramento and Yolo Counties; that, since he has been with the distributorship starting in November, 1971, they started having very serious beer shortages and had to ration beer throughout their market area; that, back as far as 1963, when he was with the distributor in Denver, from time to time there were beer shortages with separate packages and it was a problem, but he stated, "I think the thing that helped a little bit was the fact that we were so closely located to the brewery" (Tr. 1789); that the Foster Company posts its prices with the Alcoholic Control Board in the areas that it operates pursuant to the law and sets the posted price; that Coors Company sets the posted retail price, which is a minimum price, pursuant to the California law; he testified concerning exclusive draft accounts (Tr. 1790);

> "Well, we don't really have any policy that we're aware of with regards to exclusive draft accounts. We have in our distribution area about 130 draft accounts at this particular time and I would say that between 35 and 40 of them are split accounts. We, as the distributor, don't really care to have split accounts because it increases our problems of service and quality control. We have had brand substitution. Some beers are cheaper than ours and when somebody

[Part 2, p. 1063]

> requests beer, they hit the knob of their choice and sometimes we don't feel that the consumer is given a fair shake in split draft accounts."

He stated that there is always the possibility that someone might order Coors beer and be given some other beer, and he thinks it does happen because some of the people involved in the industry don't really care about that part of their business and are trying to make money by substituting a brand that is less price and less quality than Coors (Tr. 1791); that draft beer must be kept cold all the time from the brewery until it is served to the customer or it will deteriorate rapidly. He testified that he has never joined with any representatives of Adolph Coors Company in threatening retailers in any way concerning prices, his prices being posted by law and being minimums; that he has not, in conjunction with the Coors Company, threatened any retailer with no deliveries to him; that the Coors Company has never threatened him as far as his territorial limitations are concerned; that he has never been threatened by any agent of the Coors Company in relation to his split draft account situation; that he has never been threatened by the Adolph Coors Company in conjunction with any central warehousing policy, stating, "We deliver to every account every week, and that's our control" (Tr. 1794); that his understanding of central warehousing "is where we would make a large drop of large quantities of beer into a centrally located warehouse, which in turn would be delivered by somebody other than ourselves * * * By ourselves to a central location, which in turn would do our job for us, if they could keep – if they could operate under the same conditions and same standards that we as Coors distributors do" (Tr. 1794); that he would not be willing in his distributorship to trust his responsibility to anybody else along those lines (Tr. 1795); that he has never been threatened or coerced or intimidated by any member of the Coors Company or any of its agents; when asked what importance he placed upon the five-and-thirty day termination provision in his contract, he replied (Tr. 1795):

> "In all honesty, they don't mean a thing to me. I have a personal pride that I would think that it would be

> a personal reflection on me if I weren't conducting myself in a businesslike manner."

On cross-examination, the witness stated that Mrs. Foster, the owner of the Foster Company, had told him that nothing had been paid for the Coors distributorship; that, for the fiscal year ending August 31, 1971, they sold 100,800 barrels or $4,785,000; that in 1971 the distributorship's total in-

[Part 2, p. 1064]

vestment, the retained earnings of the corporation, were approximately $150,000 which includes the equipment but not the warehouse which is owned by Mrs. Foster and leased to the corporation; in August 1971, the net profits after taxes were about $86,000; that he owns ten percent of the distributorship; that he had submitted his application to the Adolph Coors Company in February 1970, was interviewed for the distributorship, and was recommended to Mrs. Foster as a potential investor; that she made the decision to bring him into the distributorship because she wanted to "start her retirement process and still remain active in the business"; that he paid Mrs. Foster $65,000 in cash for his ten percent interest in the company, which he borrowed from the Aurora National Bank in Colorado; that he believes the business today is probably worth "two hundred and seventy-eight thousand" dollars although he hasn't looked at a financial statement for some time; when asked about his agreements with Mrs. Foster as to acquiring further ownership in the business, he replied (Tr. 1813):

> "I can acquire up to forty-nine percent of the outstanding shares in the corporation through November 23, 1975. At that time I may purchase controlling interest in 1977. I will be allowed to purchase another – I will be allowed a seventy percent holder or – or a seventy-one percent holder, and then in 1980 I will be permitted to buy one hundred percent of the corporate stock."

He testified that, at the meeting when he purchased his ten

percent interest in the stock from Mrs. Foster, there were present Mrs. Foster, her accountant, Mr. Gorman, Mr. Chet Korter and himself in order to help in establishing their agreement and "we wanted to make sure that Mrs. Foster was able to get everything out of the operation that she was entitled to" since she is a widow (Tr. 1314); that, concerning her reason for taking a partner, he stated (Tr. 1814): "I was aware that they did a market survey in her distribution area and gave her several alternatives to follow, as suggestions to help her out." He learned this through Mrs. Foster. He stated that he is familiar with the Coors Company policy (RX 1047-A) which puts in writing the oral policies that have always been in effect ever since he has been active in the beer business; that, at the suggestion of the Coors Company, they are in the process of putting together their own company's policy brochure and more carefully defined job descriptions to increase efficiency where their employees are represented by the Teamster Union; that, when Budweiser had a "post-off" or dropped its prices at the retail level, "we had a fifty-four and a half percent

[Part 2, p. 1065]

increase in our distribution area this last year, and to be quite honest, we didn't notice any effect on their overall sales"; that his company has never had post-offs; that their draft beer is not profitable to them at the present time but they don't increase their price because they would like to use their draft beer as exposure to the on-premise drinkers so they will be able to sell beer to them in the package stores; that Olympia has had the biggest part of the market penetration at this particular time and is priced identical to Coors; that Coors has about twenty-five percent of his marketing area, and his distributorship also has Rainier ale, that, if for some reason they lost the Coors distributorship, they could probably use their facilities for distributing another kind of beer; that draft beer is just one of many packages that they service; that they have 1536 licensed retailers in his distribution area and they serve all except 120; that they have approximately 130 draft accounts, a number of them being split accounts but he didn't know the exact number;

that they are split with everybody except Olympia and "they won't split with us".

5. Cecil Scott.

Cecil Scott, having previously been duly sworn, testified (Tr. 1825-1843) that he is the same Cecil Scott who testified before; that he is in business in San Angelo, Texas, and became a Coors distributor in 1966; that he sold approximately 16,000 barrels of Coors beer in 1971; that he did not pay anything for his Coors distributorship; that he is familiar with RX 1047-A, the policy manual of the Coors Company, gets periodical bulletins on recycling and various information about draft equipment, etc.; that Coors' representatives call on him very regularly and they discuss his operations and his market; that he has a written contract in which his territory is specified; that since 1966 he has been short of Coors beer every year; that he would not have contracted with the Adolph Coors Company had he not known it was their policy to have only one distributor in a given area; that he sets the prices for his beer; that the retailers set their own prices for their beer; that there is a normal markup of about twenty-five percent and at times some retailers sell Coors beer for less than that and have advertised these sales prices a few times; that RX 636 is an advertisement running Coors beer at ninety-nine cents on Thursday, Friday and Saturday, November 4th, 5th and 6th, by a grocery store new in 1971 in the San Angelo Standard Times; he has a policy to try to get them all exclusive draft accounts if he can; when asked, "Now why do you try to do that?", he replied (Tr. 1829):

[Part 2, p. 1066]

> "Well, storage space and service problems and this sort of thing. Most of my accounts are real small and will only hold a couple of kegs and if you split it with another – they never have run out while they're closed. They run out when they are the busiest and then if they call, you just can't get there in time, and they are mad, and it's just a built-in problem.

He testified that he has never been joined with any agent of Adolph Coors Company in threatening retailers who did not adhere to certain prices; that he has never threatened or been joined by any agent of Adolph Coors Company in threatening any retailers by curtailing their deliveries of beer; that Adolph Coors Company has never threatened him so far as his territorial boundaries are concerned "in any way, shape, form or fashion" (Tr. 1830), nor by any Coors agents; that his contract has a 30-day termination clause in it but that he never placed any importance on it because "I sold my home in Midland, Texas and invested my life savings and borrowed $200,000 before I ever knew we was going to have one, and so I never placed any importance to it whatsoever" (Tr. 1831); that he went into business on April 25, 1966 and within a couple of days, around the 27th or 28th of April, he delivered the first beer to a Mr. Letcher in a store at Minnard; that they go to the retailer once a week and, when his route man, went back to that Minnard store the second week, he reported that they didn't take any beer; that this went on for about three weeks and Mr. Letcher didn't take any beer, so they checked and he still had the beer in a back room so he went down and bought it at retail price; that the following exchange took place (Tr. 1832):

"Q. Why did you buy it?

"A. Well, it had been in there three weeks and I thought he was going to keep it and let it get old and then put it on the market and hurt me, and so I bought it to get it out of there. He wouldn't let me put up a sign or he wouldn't let me display any in the front, and I couldn't understand what he was trying to do to me."

6. Stuart Coleman.

Stuart Coleman, of Brownwood, Texas, testified (Tr. 1843-1860) that he has been a beer distributor for twelve years, that he started with Budweiser and then went to Jax in 1962 when he ceased distributing Budweiser; that he ceased

distributing Jax in 1971; that he started distributing Coors in January 1966; that his territory consists of Brown, Comanche, Coleman, McCulloch, Mills, Llano and Burnet Counties, Texas; that he paid nothing for his distributorship; that he is familiar with the policy brochure of the Adolph Coors Company (RX 1047) and conducts his distributorship basically in conjunction with that policy manual; that he has draft manuals, sales manuals, newsletters sent out each month, and recycling bulletins from the Coors Company and has meetings with the Coors sales representatives from time to time; that he has a written contract with Coors in which his territory is specified; that since 1966 shortages of Coors beer in various packages are common in his distributorship; that he would not have contracted with the Adolph Coors Company had he not known it was their policy to have only one distributorship in a given area "On account of the investment that we make in our distributorships and our warehouses and our trucks and stuff" (Tr. 1847); that in the Brownwood area he competes with large national brands such as Schlitz and Budweiser; that he sets his sales prices to the retailers; that he discusses his sales prices from time to time with members of the Coors Company but makes the final decision as to what those prices are; that he discusses the retail prices with the retailers because he wants them to make a fair markup on their product, but the retailers set their own prices and the decision they make is theirs (Tr. 1849); that he would like to have all exclusive draft accounts, but he has just one exclusive. He stated (Tr. 1849-1850): "We maintain our beer on a different pressure with the CO_2 gas and it creates quite a problem whenever you have splits because the retailer, if he doesn't have two gas setups, we just can't do any good at all with them because we draw on a higher pressure than the biggest part of the other breweries"; That [sic] he has never been joined by any agents of the Adolph Coors Company in threatening retailers so far as the retail prices are concerned; that he has never threatened retailers on pricing by using as the threat the fact that he wouldn't deliver any beer to them; that he has never been threatened by any agency of the Adolph Coors Company in conjunction with his territorial limitations; that he has never been threatened or coerced or intimidated in any way by an agent of the Adolph Coors

Company on any subject; that he is familiar with his contract with the Coors Company and knows about its termination provisions, stating "It has no effect on me" (Tr. 1851); that he knows Mr. Letcher and did business with him in Mr. Letcher's Brownwood store until "he started footballing my beer and what I mean by footballing it, shoving it around and putting other beer signs in front of my spaces in the cold box and stuff, and I have had quite a few problems with Mr. Letcher" (Tr. 1852); that he cut

[Part 2, p. 1068]

Mr. Letcher off of beer in June of 1966 "On account of him footballing me around and I asked him to stop, and he didn't, and he started out then by advertising my beer below what I was selling it to him for" (Tr. 1852); that he didn't service Mr. Letcher again, but serviced his ex-partner who bought him out in October or November of 1971; that he would never do business with Mr. Letcher again and made that statement to the brewery; that the Schlitz distributor also cut him off three years ago, stating, "Judge, at that time I understand that that was the time Schlitz was in a shortage of beer and Mr. Letcher wanted more than his equal share and he got in an argument with the Schlitz distributor and the boy just quit servicing him" (Tr. 1853); that he was president three years ago of the Texas Wholesale Beer Distributors, and is still a director. On cross-examination, he testified that his investment in his distributorship is about a hundred and sixty thousand dollars, and it is profitable; that Budweiser had a promotion last month giving discounts to their retailers on quantity buying, but it had no effect on his sales; that he has never made a promotional sale of that sort with Coors beer; that Budweiser frequently has such promotions, for example, in 1971, "I'm going to say four times, and they would last anywhere from thirty to sixty days" for each promotion, sometimes on bottles and sometimes on cans; that he has twenty-nine percent of the market for Coors beer in his area; that Schlitz is the leader in this area with thirty-eight percent of the market and Budweiser is behind Coors; for what little he sells, draft beer is profitable; and that he has one exclusive account and six splits. On redirect examination, as to

competition, in the categories of "easy, tough or relatively tough", he testified that both Budweiser and Schlitz were "tough" (Tr. 1859); that there were 139 licensed retailers in his area and he serves all of them; that there are thirteen draft accounts in his area and he has seven of them (Tr. 1859-1860).

7. John A. Boersma.

John A. Boersma, of Blackwell, Oklahoma, testified (Tr. 1860-1876) that he is a wholesale beer distributor and has been in that business since 1946; that he really grew up in the business since his father was in it before him; that, at the time they began handling Coors beer in 1956, his father and he were in a father and son partnership in their business, but his father is no longer active in the business; that he has a 22-year old son who is now a full-time member of his operation and his company has been a family company ever since its inception; that, prior to 1956, they handled Country Club beer and Muhlbach beer, which both are out of the market now; they also handle Schlitz

[Part 2, p. 1069]

beer now; that his territory covers Kay, Noble, Payne, Osage and Pawnee Counties in Oklahoma, actually about a four and a half county area; that they did not pay anything for their distributorship; that he is familiar with the policy manual (RX 1047) and it is their guide in the operation of their Coors distributorship; that he also receives letters and a regular monthly distributor bulletin from Coors, and they have a draft beer manual and an advertising manual, and have regular visits with their Coors sales representative concerning the operation of their Coors distributorship; that he has a written contract with Adolph Coors Company in which there is a specified territory which is his responsibility; that in the last few years there has been a regular occurrence of shortage in certain packages of Coors beer; that he would not have contracted with the Adolph Coors Company had he not known it was their general policy to have only one distributor in a given area because "I don't believe you could justify the

investment that you would place in a distributorship. I don't believe you could compete with competitive brands" (Tr. 1864); that they compete with three different wholesalers who sell Stagg [sic], Budweiser, Miller's, Falstaff and Busch beer and he characterized this competition as "aggressive" (Tr. 1864); that he discusses his wholesale prices to retailers with various people within his organization but he sets the wholesale prices; that the retailers set their own prices and sometimes he counsels them; that he has forty-three draft accounts, two being split; that he services three hundred ten retail accounts; that draft beer is a very vulnerable item as to quality control and in this connection he testified (Tr. 1866):

> "Well, draft beer must be strictly refrigerated. Draft beer must be dispensed under idea[l] sanitary conditions. Draft beer requires far more equipment to dispense in a retail account than just selling packaged beer. This equipment must be properly maintained. The equipment must be in proper order to actually dispense quality draft beer."

He testified that he had never joined with any agent of the Adolph Coors Company in threatening any retailer in any way concerning his prices; that he had never threatened any retailer in conjunction with the agents of the Adolph Coors Company as to any phase of his operation concerning his supply of beer that he would receive; that he has never been threatened by the Adolph Coors Company with termination of his distributorship by virtue of selling outside of his territory; that he has never been threatened or coerced or intimidated by any agent of the Adolph Coors Company in any manner; that he is familiar with his contract with the Coors

[Part 2, p. 1070]

Company and, as to the five and thirty day provisions in that contract, he stated, "I feel this is really no problem, or no concern" (Tr. 1867); that, to be a good Coors distributor, "I feel primarily that we need to market Coors beer in a quality manner to provide quality services for our retailers; to follow

the items, the philosophies in the Coors policy manual, and this is what we do" (Tr. 1867); that general compliance with the general statement contained in the policy manual (RX 1047-A) is the key to being a good Coors distributor and he agrees with that type of policy; that his territory especially is in what is commonly referred to as the "bible belt" with very strong Baptist and Methodist activities, and he stated, "This puts the beer business in a little tougher position as far as proving yourself as an upstanding business operation" (Tr. 1869); that he is a member of the Presbyterian Church and has served on the board of deacons and trustees and is now on the board of trustees; that he has twice been a director on the board of directors of the Oklahoma Malt Beverage Association. On cross-examination, he testified that the original investment made by his father and himself in their distributorship in 1955 was somewhere in the neighborhood of $70,000, including warehouse facilities (Tr. 1870); now his investment in his distributorship is in the neighborhood of $400,000, and is a profitable business; that he still sells Schlitz beer which is approximately ten percent of their total volume; that at the time of the forming of their partnership, they handled Country Club and Muhlback beer, which companies no longer exist, and they handled Lone Star beer in the past; that he thought his Coors distributorship holds somewhere around sixty-five percent of the beer sales in his market area, which would not take into consideration their sales of Schlitz; that Budweiser is his closest competitor in terms of market area, with approximately ten percent of the market, but it could be greater then [sic] that; that, if he no longer distributed Coors beer, he didn't believe he would be able to use his facilities to dsitribute other beer and that, if Coors terminated his contract, he would be out of business (Tr. 1873); that Coors "is the finest quality beer" and, he stated, "I think the quality product and the quality procedures have a total to do with the sale of Coors beer" (Tr. 1873); and that, with regard to any price increase he might make, his best guess would be that it would have a detrimental effect on his sales.

8. Vincent J. Domenico.

Vincent J. Domenico, of Lakewood, Colorado, testified (Tr. 1876-1892) that he has been a Coors beer distributor for fifteen years; that his territory is part of Jefferson

[Part 2, p. 1071]

County, Colorado; that, upon graduation from college, he was a liquor salesman in Denver, Colorado, but learning there was an opening with Adolph Coors Company, he applied and was approved by Coors; that he started with Coors in the beer business in Morrison, Colorado, which is also in Jefferson County; that in 1971, his organization sold 55,000 barrels of Coors beer; that he did not pay anything for his Coors distributorship; that he has familiarized himself with the Coors policy manual, RX 1047, and uses that policy manual in the general overall conduct of his business; that he would not have contracted with the Adolph Coors Company had he not known it was their general policy to have only one distributor in a given area because "we've got too much money tied up" (Tr. 1882); his biggest competitor is Budweiser, then probably Schlitz and then Miller's (Tr. 1882); their distributors have exclusive territories; that he decides his prices to the retailers; that the retailers set their own prices although he makes suggestions to them and sometimes the retailers abide by his suggestions and sometimes they do not; that he services 257 accounts, of which 90 are draft accounts; that he has splits out of those 90 draft accounts; with regard to his policy regarding splits, he testified (Tr. 1833):

> "We have a policy regarding splits, that if we are split, we don't like to be taken advantage of. We like to have our product be taken care of in the manner in which we – which we explain to the retailer. Let's take as an example that we are split with Budweiser. If we have Coors and Budweiser in here, and if as an example you come in as a consumer and ask for a glass of beer, the average owner is so advised that, 'We have two. We have Coors and Budweiser.' And if you say you want Coors, you get a glass of Coors, and in a Coors glass.

And, if you like Budweiser, you get a glass of Bud in a Budweiser glass."

He testified that the care of draft beer does present problems in the cleanliness of it, the temperature, the refrigeration, the age, and the rotation (Tr. 1884); that he has never joined with any agents of the Adolph Coors Company in threatening retailers so far as their pricing structures were concerned; that he has never threatened a retailer in any manner or used as a threat the fact that he might not deliver him beer or do this in conjunction with agents of Adolph Coors Company (Tr. 1884); that he has never been threatened by the Coors Company in any way because of the territorial limitations in his contract; and that the Coors Company has never threatened him in any way

[Part 2, p. 1072]

because he had too many splits in his territory (Tr. 1884). He stated that the Coors Company has never threatened him because he sold to a central warehouser in Colorado; that the laws of the State of Colorado are such that central warehousing is not permitted (Tr. 1885); that he has never been threatened or coerced or intimidated in any manner by any agent of the Adolph Coors Company (Tr. 1885); that he is familiar with his contract generally and knows that it contains certain termination provisions, but such provisions do not affect his operation in any way (Tr. 1855); that he conducts his business along the lines of the general statement in the Coors policy manual, RX 1047, and believes that it is very important in the success of his business to do so (Tr. 1886).

On cross-examination, the witness stated that he only sells Coors beer in his distributorship (Tr. 1888); that his initial investment in the distributorship was probably thirty thousand dollars (Tr. 1889); that his investment now in 1972 is probably six hundred thousand dollars, and his distributorship is profitable (Tr. 1889); but he has not been approached by any other brewers; that Coors beer is

the best in quality and that this quality relates to the sales of Coors beer; that of his ninety draft accounts, ten are splits; and that his Coors distributorship has about sixty percent of the total beer market in his market area, with Budweiser his closest competitor (Tr. 1892).

9. George J. Maloof.

George J. Maloof, whose company is Joe G.[sic] Maloof and Company, Albuquerque, New Mexico, testified (Tr. 1893-1910) that he has been in the wholesale beer business for thirty-five years; that he is now 48 years of age and was in the business before he graduated from college; that it has been a family company for many years and distributes all over the State of New Mexico; that his company is the only Coors distributor in the State of New Mexico (Tr. 1894); that he did not pay anything for his Coors distributorship; that he is familiar with the general policy manual of Coors; that recently he has been short of Coors beer quite often; that this shortage has continued from time to time for a number of years; that he would not have contracted with the Coors Company had he not known it was their general policy to have only one distributor in a given territory; in this connection, he stated (Tr. 1897):

> "Well, I wouldn't have any control over my business. And I think that one of the important things in the beer business is to be able to protect quality of product. And I think that's

[Part 2, p. 1073]

> one of the assets of being an exclusive distributor, is that you can protect the quality of the product that you sell."

He stated that their two major competitors are Budweiser and Schlitz, with Hamms third, and Falstaff fourth (Tr. 1898); that competition is pretty keen in the beer business brand to brand; that in setting his prices, he has

different prices in different markets, and freight is one of the big factors involved in setting prices; that also, "I try to use a policy of having a fair profit because I know to operate my business properly I've got to have a fair profit, and I base my market so that I can have a fair profit and have a good operation" (Tr. 1898); that he sets the prices for his company (Tr. 1898); that he has ten warehouses located throughout New Mexico; that the retail prices are set by the retailer; that there is a very wide range of prices in New Mexico; that he has never joined with any agents of the Adolph Coors Company in threatening retailers with prices in any way, nor has he by himself threatened any; nor has Coors Company by itself threatened any; that he has never threatened any retailer in conjunction with the Adolph Coors Company so far as withholding deliveries from them if they didn't do certain things on prices, and that he has never threatened them himself; that he has never seen anybody from the Coors Company do it; that he has never been threatened by the Adolph Coors Company if he didn't stay within the State of New Mexico in selling beer; that they strive to have exclusive draft accounts because "we think we can have better quality control with an exclusive draft account", but they do have split accounts (Tr. 1900); that the Maloof organization serves in the neighborhood of 1400 retail accounts in New Mexico and they have "roughly around 300" draft accounts with about 45 or 50 splits in the State (Tr. 1900-1901); that the Coors Company has never threatened him in any way so far as his split accounts are concerned; that no agent or employee of the Coors Company has ever threatened or coerced or intimidated him in any way, shape or form (Tr. 1901); that he is familiar with his contract with the Coors Company and that it contains some termination provisions, stating, "I think they can terminate us in thirty days", but that doesn't bother him in his company "not as long as I do a good job" (Tr. 1901); that his family first started with the Coors Company in 1938, and that his two sisters and two brothers and he all participate in the distributorship (Tr. 1902); that there are pricing variations all over the State of New Mexico at both the wholesale and retail

levels (Tr. 1902); that he handles Pabst Blue Ribbon and Burgermeister beers in a separate company that they have; that they just bought twenty-five refrigeration units, at $2500 apiece, to refrigerate twenty-

[Part 2, p. 1074]

five trucks (Tr. 1903); that they also handle certain liquors; that he does have territorial restrictions imposed upon him by the other beers that he handles in New Mexico, and he is restricted to the State of New Mexico (Tr. 1903); that he knows Jack Bradshaw, who owns a bar and package store in Albuquerque and has been in business for about four years, handling "all of our packages, bottles and cans and also draft" as well as Budweiser (Tr. 1904); that he has never told Mr. Bradshaw that he couldn't handle Budweiser there; that there is a lot of price cutting going on in the New Mexico beer market with the price cuttings advertised freely in the newspapers (Tr. 1905). On cross-examination, the witness stated that his company is incorporated in the State of New Mexico and not licensed to do business in any other state; that his business is profitable; that he has other beers, Pabst and Burgermeister, in his distributorship at the present time which he handles "in a company that I have that sells the liquor along with the beer" and is separate from his company that sells Coors beer (Tr. 1906); that he does not share any equipment with Coors, or facilities for these other beers; that Coors accounts for about forty percent of the beer market in New Mexico, their closest competitor in percentage being Budweiser with about twenty percent, Schlitz would be third with about eighteen percent, and Hamms would be fourth with about six or seven percent (Tr. 1907); that several brewers have approached him in the last five years to handle their beer but he preferred not to name them (Tr. 1907-1908); that he told these brewers that "I was very satisfied in just handling the beers I have now" (Tr. 1908); and that he believes Coors is a good quality beer.

10. William Lee Scott.

William Lee Scott, whose residence and business is in Boise, Idaho, testified (Tr. 1910-1923 J) that he has been a

Coors beer distributor for the past four and a half years when he bought out an existing Coors distributor; his territory is the bulk of southwestern Idaho, to the Oregon border, and midway in the state in an eleven-county area (Tr. 1911); that he paid nothing for his distributorship to the Coors Company; that he is familiar with the Coors policy brochure, RX 1047, and conducts his distributorship in compliance therewith; that his other sources of material concerning his operation of his distributorship are the advertising manuals and draft manuals from Coors, talking with merchandising, advertising, sales representatives, representations from the draft and legislative departments, and meetings from time to time with the other distributors (Tr. 1912); that he has a written contract with Coors in which his territory is specified (Tr. 1913); and that he has been short of Coors beer almost all the time he has been a Coors distributor.

[Part 2, p. 1075]

He stated that he would not have contracted with the Adolph Coors Company if he had not known it was their general policy to have only one distributor in a given territory because "we have a very difficult time competing with other brands of beer as it is, and if we had to compete with another Coors wholesaler in my territory, it would just make it an intolerable situation" (Tr. 1915); that he competes in his territory with the Olympia Brewing Company, Anheuser-Busch Company, Schlitz, Rainier Brewing Company out of the Coast, the Blitz-Weinhard Company out of Portland, Miller Brewing Company and a number of other small retail breweries (Tr. 1915-1916); that competition is extremely stiff; that he discusses pricing with the brewery but sets his own prices; that the retailers set their own prices (Tr. 1916); that there is a great deal of discounting of beer going on in his market and the discounting is advertised; he was handed Rx[sic] 537 which he stated was an ad from Skaggs Drug Stores, a drug store chain operating in Boise, advertising Coors twelve ounce cans, which appeared on May 24, 1970 in the Statesman newspaper in Boise (Tr. 1917-1918); he testified regarding RX 538 that this was an ad in the Statesman newspaper by Skaggs Sports Center advertising Coors beer for

ninety-nine cents and couldn't recall the exact time, but stated that it could be in October of 1970 (Tr. 1918); that he services approximately 600 accounts in his territory, of which 200 are total draft accounts; that 95 draft accounts are Coors out of the 600, and there are five split accounts of the 95 draft accounts; that he doesn't like split draft accounts; with regard to the five split accounts, these are all pizza parlors and he started with them about four and a half years ago with his first split account and has actually increased them since that time (Tr. 1921); that he never joined with any agents of the Adolph Coors Company in threatening retailers concerning their prices, nor has he done so himself; that he has never seen anybody from the Coors Company do so; that he has never threatened retailers on pricing nor has he ever threatened retailers on pricing with the threat that he wouldn't delivery any beer to them, nor has he done that with any agents of the Coors Company; that no agent of the Coors Company has ever threatened him on the basis of the territorial restriction in his distribution contract (Tr. 1922); that no agent of the Coors Company has ever threatened him with regard to his attitude toward split accounts; that he has never been threatened or coerced or "shoved around" or intimidated in any way by anybody connected with the Adolph Coors Company (Tr. 1922); that he is familiar with his contract with the Coors Company and with the five and thirty day termination provision but does not place any particular effect upon that (Tr. 1922); that, in order to be a good Coors distributor, he stated (Tr. 1922): "I think

[Part 2, p. 1076]

to be a good Coors distributor, a good beer distributor for any brand of beer for that matter, you have to do the best job possible and in light of good business practices and principles, and this is what we try to do." He stated that he was a wholesale distributor for the Olympia Brewing Company when he became a Coors distributor in 1967 (Tr. 1923); that he was actively selling Olympia beer when he applied for the Coors distributorship and the Coors Company agents he applied to knew he was the Olympia distributor and discussed it with him and how he would operate his organization with

having both brands of beer (Tr. 1923); that the Coors people did not tell him that he had to get rid of Olympia and he continued selling Olympia beer for three years after he started selling Coors (Tr. 1923 A). On cross-examination, the witness testified that he had acquired his Coors distributorship in June 1967 and paid approximately $250,000 for it; that the thirty day termination clause in his contract does not bother him (Tr. 1923 D); that his dollar sales in 1971 were somewhere in the vicinity of two million five hundred thousand dollars (Tr. 1923 D); that he could not testify as to his net profit in 1971; that he sold his Olympia beer distributorship two years ago; that the sales between Olympia and Coors were approximately fifty-fifty, Coors having a very slight edge over Olympia at the time he sold the Olympia distributorship; that Olympia specified his territory and he found that to be the case with all the beer distributors so far as the brands they represented when he was president of the Idaho Beer Wholesalers Association (Tr. 1923 I); that he sold Olympia because it was very difficult to run two operations and he felt it was an opportune time to get the largest profit out of the operation, and that it was his own choice, that he had no problem with either brewery (Tr. 1923 I).

[Part 2, p. 1077]

11. Joseph Stemach.

Joseph Stemach testified (Tr. 1923 J-1923 X) that he is from Eureka, California, two hundred eighty miles north of San Francisco; that he is vice-president and general manager of D&H Distributors of Eureka, California; that they obtained the Falstaff line in July of 1956; that one year later, they obtained the Coors line; that they distribute Coors beer in Humboldt, Del Norte and a small part of Trinity Counties; that he has a written contract with Coors in which his territory is specified (Tr. 1923 L); that he did not pay anything for the Coors distributorship; that he has not had sufficient quantities of Coors to fill the retail demand in his area for the last four or five years because the brewery could not supply them; that they would not have contracted with the Coors Company had they not known it was Coors' general

policy to have only one distributor in a given area because they would not have invested their money along with one or two other distributors in the same market, and a big factor is quality control, rotation of the beer, and "a matter of servicing the smaller accounts * * * if there are two or three distributors in the market, everybody would be going for the larger accounts and things of that nature" (Tr. 1923 M); that he competes with other brands of beer sold in his territory, namely, Olympia, Hamms, Budweiser and Burgermeister, but being the only Coors distributor in that area enables him to better compete with these big national brands (Tr. 1923 M); his company sets the prices to retailers; the retail prices are set by the retailers, with no fixed pattern in his market, and in some outlying areas the prices are somewhat higher; that he has never been threatened or coerced or intimidated by any member of the Coors organization (Tr. 1923 O); that he is familiar with the five and thirty day provision for termination in his contract and that does not bother him (Tr. 1923 O); that he is familiar with the general policy statement, RX 1047, and complies with the general statement found in pages 1047-E, F and G thereof because it is necessary for the orderly conduct of his distributing business (Tr. 1923 O); that they handle Olympia in the Rosaia house, and at Crescent City they handle Olympia, Coors, Miller's and Country Club, and a line of wines; that no member of the Coors organization has ever told him that he had to get rid of those other brands; that they have both written and oral contracts with the other breweries for those other brands and in all of them his territories are specified and he is limited to those territories (Tr. 1923 P); that they have a wide range of prices at the retail level in his market, and the previous week, for a six-pack of twelve ounce cans, the lowest price at the retail

[Part 2, p. 1078]

level was a dollar twenty-nine going as high as a dollar seventy-five in the outlying areas, with all the prices somewhere in between these two levels. On cross-examination, he testified that D&H Distributors distribute Coors, Miller's and various lines of liquors; that the refrigerated portion of the warehouse is strictly for Coors; that the liquor and

Miller's do not need refrigeration; that other brewers have asked him to distribute their beer but he told them he was happy with what he had since the market is a small market and there is no place for other beers in his particular house and he didn't feel he needed additional beers (Tr. 1923 T); with regard to the price of a dollar seventy-five in outlying areas, he stated (Tr. 1923 T): "Well, we live in mountainous country and we have quite a number of long-mile hauls and some of the small outlying areas who work more or less on a seasonal basis feel they need more money to show them a profit because three or four months out of the year, they are down" (Tr. 1923 T); that the retail price range in the town areas is generally a dollar twenty-nine and it is pretty well sold at that price; and that he sells Coors draft beer to taverns and has forty-two draft accounts, six of them being splits.

12. Ray Clymer, Jr.

Ray Clymer, Jr., of Wichita Falls, Texas, testified (Tr. 1926-1968) that he was a wholesale beer distributor in eleven counties in northern Texas; that he became a Falstaff distributor in 1959 and in 1966, he became a Coors distributor; that he did not pay anyone for the right to handle Coors beer; that he is familiar with their policy manuals; that he has contact with Coors' sales representatives who call on him every six or seven weeks; that on occasion, he attends distributors' meetings; that he has a written contract with Coors which specifies his territory; that recently he has not had sufficient quotas of beer to take care of the territory requirements; that he has experienced shortage difficulties on a number of occasions since he became a Coors distributor; that he would not have contracted with the Adolph Coors Company if he had not known it was their policy to have only one distributor in a given area; that Budweiser, Schlitz, Falstaff, Lone Star, Jax and Pearl are substantial competitors in his territory, and competition is "pretty tough" in his area; that he sets his sales prices to the retailers after counseling with Coors' representatives, his supervisor and his personnel in his organization (Tr. 1934); that the retailers set their own prices; that he services approximately 350 accounts in his

territory, 75 of them being draft accounts, with 25 exclusive Coors accounts and 50 split draft accounts (Tr. 1935); and that his policy regarding exclusive draft accounts is that he likes to have an account that serves Coors beer and not serve any other brand. Mr. Clymer further testified that he has never threatened any retailers in his territory concerning their prices (Tr. 1938); that no Coors agent has ever threatened him in any way concerning the territorial limits of his contract or his split accounts (Tr. 1938); that when he went into the beer business in 1959, he distributed the products of Falstaff and Miller Brewing Companies in Grayson County, Texas (approximately 130 miles due east of Wichita Falls) originally and then later he purchased the Falstaff distributorship in Wichita Falls, Texas; that, when he took on Coors in 1966, he also had Falstaff and Miller's in Grayson County, Texas, and in Wichita and Archer County, Texas, he had Falstaff (Tr. 1939); when asked if the Coors Company made any demands upon him as to his other products that were conditional upon his becoming a Coors distributor, he replied (Tr. 1939): "Quite the contrary. They pointed out to me that it was acceptable to them for me to continue handling the other products." He stated that thereafter, he continued to handle Falstaff just one day when he was "terminated" by Falstaff because "Falstaff didn't like the idea of me selling Coors beer" (Tr. 1940); that he had a written contract with Falstaff and was restricted in the sale of Falstaff to that territory (Tr. 1940); and that he was a director of the Wholesale Distributors of Texas for approximately nine or ten years (Tr. 1945). On cross-examination, the witness testified that he was a Falstaff distributor from 1959 through 1966 when he was terminated by Falstaff both in Grayson and in Wichita Falls; that he continued to handle Miller's for a couple of years after he started handling Coors beer, but was terminated by Miller's, which territory was only in the Grayson County area, but he had Falstaff in both areas. He testified that he would not want any other distributor from another district to sell in his area, stating (Tr. 1950); "Well, I don't want any more competition than I have. I wish they would take the Budweiser distributor out." He stated that all major distributors of beer are all limited to a territory. With regard to his statement, "Well, I don't believe I could have

justified taking the action it was necessary for me to take to become a Coors distributor * * * had I not felt I would be the sole distributor in that area" (Tr. 1933), he explained (Tr. 1951):

[Part 2, p. 1080]

> "Well, I had the Falstaff distributorship there and at that time it was the leading selling beer in our area. I had to take a calculated risk with the Falstaff distributorship and my arrangement with Falstaff Brewing Company when I took on Coors. I took a calculated risk, sir, that Falstaff might cancel my distributorship, which resulted in a severe financial loss to me. I had to take that calculated risk. I took it based upon my knowledge of the Adolph Coors Company, their relationships with their distributors, their past successes. That was a consideration in my thinking at that time. In fact, it was a pretty big consideration."

He testified that he had approximately 25 exclusive Coors accounts in his area and on occasion had one or two splits, stating (Tr. 1951): "* * * under the proper circumstances we would split * * * if an account had the facilities and the mechanical equipment to assure us that our beer would be drawn under the proper conditions and if we were convinced that they would not substitute our product or abuse it in any manner, we would split with them." With regard to the mechanical equipment to take care of the different pressures of Coors, the following exchange took place (Tr. 1952):

> "HEARING EXAMINER JOHNSON: Would that involve storage space?
>
> "THE WITNESS: It would, yes, sir, Judge. Some of these accounts can only store two kegs at a time. If they have one Budweiser and one Coors, if the Coors runs out they are just out of business until we can get there and deliver them again. In the meantime, that is when we run into that substitution problem where somebody orders a glass of Coors and they don't tell them they are out, they give them a glass of Budweiser or something."

The witness testified that in 1971, he had approximately 38 percent of the sales in his marketing area, with an estimate of 20 per cent of the business for Schlitz, and Budweiser having approximately 24 per cent (Tr. 1958); that, as far as he knew, Coors had the largest sales in his marketing area (Tr. 1958); that no one from Coors had ever threatened him in any way (Tr. 1959); that Wayne Campbell, Mel Linn and Ken Hayes have been his sales representatives since he has had Coors and they have had discussions and made suggestions and recommendations from time to time and were critical once

[Part 2, p. 1081]

when he first started with Coors because they found some beer that wasn't in proper rotation, but he got it corrected; when asked if he thought the criticism was justified, he replied, "I think it was the best thing that ever happened to me" (Tr. 1960); that the Coors representative had indicated to him at times that there was room for improvement in the direction of his operation generally, but "I have never been worried about losing my distributorship since the day I started" (Tr. 1962). On redirect examination, the witness stated that in Texas certain types of distributors are licensed to operate in certain counties and that retailers also are licensed; that approximately 350 retailers are licensed in his area and he sells nearly all of them; that he was terminated by Miller's approximately three years ago when he wasn't devoting enough attention to the sale of their product because he was mainly concerned with Coors since it represented by far the most substantial portion of his business and Miller's determined they could do better someplace else; that Coors "is the finest beer on the American market" (Tr. 1967).

13. C. Richard Ford.

C. Richard Ford testified (Tr. 1968-1997) that he has been a Coors distributor with his main headquarters in Oklahoma City, Oklahoma, since 1957; that his father got one of the original licenses back in 1933, and ran a small brewery,

later buying out his associates, and became Ford Distributing Company in 1946; that he has been an officer and director of that company since 1946 (Tr. 1969); that his organization did not pay anything for the Coors distributorship; that he runs his distributorship in compliance with the Coors policy manual; that he gets various merchandising letters, an advertising manual, a draft manual, and visits from the Coors representative approximately twice a week concerning the operation of his distributorship; that his contract with Coors is written and specifies his territory (Tr. 1971); that his territory is approximately 17 counties, which is the northeast corner of Oklahoma; that the major cities in his territory are Oklahoma City, Tulsa, Norman, Shawnee and Miami; that he has had a shortage of Coors beer for at least the last five or six years; that he would not have contracted with the Coors Company had he not known it was their general policy to have only one distributor in a given area because "we have a very large investment with refrigerated marketing and following the policies Adolph Coors Company feels are necessary to protect

[Part 2, p. 1082]

their product, there would be no way you could put that investment in and have more than one representative or more than one distributor in an area, say, like Oklahoma City, and make money" (Tr. 1972-1973); that in his territory, he competes with Budweiser, Schlitz and Stag, and they are all tough competitors and "They indulge in various practices which we do not consider good sound business practices which make it tough on us competitively" (Tr. 1973); that he, as president of Ford Distributing Company, advising with the executive vice-president, Wayne Campbell, sets the sales prices to retailers; that the retailers set their own prices (Tr. 1974); that his organization prefers exclusive draft accounts because keg or draft beer is entirely different from package beer in that draft beer requires certain pressures, rotation and cleaning of draft equipment (Tr. 1976). The witness testified that of the 3,000 retail accounts in his area, there are 735 draft accounts; that he services 95% of the 3,000 retail accounts; that no agent of Adolph Coors Company has ever

joined with him in threatening any retailer as far as his prices were concerned, nor has he ever threatened any retailer in conjunction with the Coors Company concerning his supply if he didn't adhere to certain pricing suggestions; "We don't threaten our retailers. We make friends of them" (Tr. 1979); that he has never been threatened by any agent of the Adolph Coors Company concerning the territories in which he distributes beer or concerning his draft account situation involving split versus exclusives (Tr. 1979); when asked if he had ever been threatened, coerced or intimidated by any agent of the Adolph Coors Company in any respect, he replied (Tr. 1979): "The Ford Distributing Company runs its own business. We don't allow anybody to intimidate us and nobody has ever tried." He testified that he has read his contract with the Coors Company, but had forgotten about the termination provisions in it until Mr. Joseph of the FTC came and asked him about it; that he told Mr. Joseph that they do what they consider a good job and "As long as we do a good job, we have complete security" (Tr. 1980); that, in order to be a successful Coors distributor, "* * * I would say, this policy manual, if you follow that, if you give outstanding service, we need to keep our beer completely fresh and rotated and we need to get a hard selling and hard hitting sales team that works hard, blood, sweat and tears is the answer" (Tr. 1980); that Old King beer is the first beer his company handled, and many years ago they handled national brands, Blue Ribbon, Miller High Life and Schlitz; that he has been president and director two or three times and secretary-treasurer once of the Oklahoma Malt Beverage

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Association in his state (Tr. 1982); when asked to define central warehousing, he stated (Tr. 1982): "Well, that would be where an operation such as a chain grocery would have, say, 50 or 60 outlets, grocery stores, and they would ask you to drop off a month's supply of beer at their main warehouse." He testified that he marketed beer through the central warehousing system in Oklahoma up until about eight or nine years ago when he quit, testifying (Tr. 1983-1984):

"Q. Why?

"A. It was impractical. We went and talked to the people and sold them on the idea it was hurting them for several reasons. First of all, when we deliver that to the central warehouse you lose complete control over the quality of your product. In other words, you can't rotate that product. It is in their warehouse and under their control. They can take the newest beer out and put it out in the stores and leave the old beer in there. We have had it happen until it would be six months old. In our market, when it is eight weeks old we pick it up, pour it out and pay for it ourselves. Our competition doesn't believe in this, but nevertheless we would find time and time again that these chain stores would be out of beer. They would deliver twice as much beer as was needed to Store 68 and Store 35 would have no beer. It was a chaotic condition. They would not keep it under refrigeration. Our policy is as much as possible to have total refrigeration of our packages from the brewery to the consumer for quality purposes. We would drop off, say, 300 cases at the warehouse of this chain. They might get it out to their stores in the next week or two or month or two. They might over-order, which we would lose control of. Then we completely lost track of whether they rotated the beer and brought the oldest beer out first for sale or not. I would say it was just a completely impractical system to work in with our product, quality control system.

"Q. You understand the responsibility for your territory lies with you, do you not?

"A. Yes, sir.

"Q. And you are unwilling to trust that, I assume, to anybody else?

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"A. That is right, I forgot to add, of course, at some of these warehouses in the summer it gets up to 70 or 80 degrees. We like to keep our warehouse at 45 degrees.

"Q. You mentioned that if beer got to be eight weeks old you dumped it and paid for it, do you recall that?

"A. Yes, sir.

"Q. When you say you pay for it, what do you mean?

"A. This is a Ford Distributing Company policy. You have to set up some rule of thumb as to what is old beer. In our case we consider anything over eight weeks old as being old beer. We set up standards with our route salesmen. If he finds it and brings it in, we pay for it. If we find it out on his territory, he pays for it.

"Q. I assume, then, that that financial responsibility is quite an encouragement to prevent that from happening, is that right?

"A. Yes, sir."

On cross-examination, he said that, out of a total of 735 Coors draft accounts, they have 55 to 60 split accounts; that he doesn't like split accounts because of the confusion and the consumer getting the wrong beer; that this is the problem you have where you only have a two-keg box and you don't have any extra backup stock and they run out of one beer and just sell the other one; with regard to a strict policy of his company that at eight weeks they pick up the old beer and destroy it, they have supervisors that see that this policy is enforced (Tr. 1988); that in the last two years, for beer destroyed, he picked the figure of $300; that Coors accounts for 62% of the sales in the State of Oklahoma; that his closest competitor is Anheuser-Busch with a market share of maybe 20 or 25 per cent in Tulsa, 15 or 16 per cent in Oklahoma

City, and in the three other markets, it varies between 15 and 25 per cent (Tr. 1991). On redirect examination he testified that they showed a decline in profit in the fall of 1970 as opposed to the fall of 1969 for about a three or four-month period and found that the freight raises caused

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increases and they seemed to be in somewhat of a price squeeze; that he took his executive vice-president, Wayne Campbell, to a meeting in Golden at the end of 1970 with Harvey Gorman, the marketing director, and Mel Linn, who was in charge of his area since they have a lot of expertise and watch the distributing operations; they went back home and put in a cost index operation and set up a bonus system whereby his people got half their bonus on sales and half on how they could cut their costs and they computed it and they made bigger bonuses and the company ended up making more money that year (Tr. 1994); that they cut their costs by 3 per cent and made more money (Tr. 1997); that he has 225 employees in his distributorship who devote 90 to 95 per cent of their time to the Coors product (Tr. 1997); that distributors of other beers such as Budweiser, Schlitz, Miller's, all have restricted areas in Oklahoma.

14. Martin H. Schinnerer.

Martin H. Schinnerer, of Long Beach, California, testified (Tr. 1998-2016) that he is president and general manager of the California Cold Storage and Distributing Company, which has four subsidiaries, and has its general office in Long Beach, California (Tr. 1998); that his company is primarily in beer distribution and refrigerated cold storage warehousing; his company went into the beer distribution business in 1933, took on the Coors line in 1936, and has had it ever since (Tr. 1999); his company has distributed most of the other lines of beer over the years, and now distributes Coors, Olympia, Schlitz, Hamms, Colt 45 and Anheuser-Busch (Tr. 2000); that his company has a written contract with Coors in which the territory where they must operate is specified (Tr. 2002); that he would not have contracted with the Adolph Coors

Company had he not known it was the general policy to have only one distributor in a given area because he feels economically it wouldn't be feasible to have two distributors in the same area (Tr. 2003); that there is a fair trade law in California that governs the consumer price, and the Coors brewery fair trades the price throughout the State of California; his company sets the prices they charge their retail accounts based on suggestions from the brewery so that the prices follow a pattern with a proper markup both for the retailer and also the wholesaler (Tr. 2004); that the only policy they have with regard to exclusive draft accounts is that they try to avoid splits, but they do have some; that for draft beer it takes a constant surveillance of the pipe cleaning, it

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has to be kept under the proper type of refrigeration at all times and the accounts need space under refrigeration at all times; his company does the cleaning once a week for every account, which he considers very important (Tr. 2005); that he has never joined with any member of the Coors Company in threatening, nor has he himself ever threatened, nor has he seen any member of the Coors Company threaten any retailers as far as pricing is concerned or by alleging that beer would not be delivered to them (Tr. 2006-2007); that he has never been threatened by any agent of the Coors Company concerning their territorial limitations or their split accounts (Tr. 2007); and that he is familiar with central warehousing (Tr. 2007). He testified that he had never been threatened, coerced or shoved around or intimidated or bullied in any way by any member of the Adolph Coors Company, its staff or its agents (Tr. 2008); that he is familiar with his contract with the Coors Company and its termination provisions, and that those termination provisions have had no effect on his conduct of his distributorship (Tr. 2008); that, as a beer distributor in southern California continually all this time, he has observed the Coors Company in its relationships with its distributors over the years and characterized the Coors Company's attitude toward distributors who were not performing their function well as follows (Tr. 2009):

"A. Well, my experience over the years is the Coors Company has had a lot of patience with at least some of the distributors I know of that were Coors distributors in dealing with them on matters that to me, I think, were rather important and that should be changed or should be done by that distributor.

"Q. Do you think there have been instances in which the Coors Company has let these things continue too long?

"A. I kind of personally feel there have been instances, yes, for the welfare of the other distributors in Coors."

Mr. Schinnerer stated that his organization distributes other brands of beer, and in those agreements the territories are defined in which he shall operate. He testified (Tr. 2010):

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"The other contracts – let me say this. There are some brands that have no contracts at all, it is verbal. The ones that are written have the phrase in there 'prime area of responsibility' and then it states – it doesn't say you have to stay inside or that it is exclusive, but it is primary responsibility. Other than that, it is pretty well worded the same."

He stated that as a policy matter they do not distribute outside of their primary area of trade responsibility; that he has about 160 draft accounts in the Compton area, of which about 13 are split; that he has about 55 in the Oceanside area, of which about eight are split (Tr. 2014). He stated that, if you don't agree with Coors' suggested price, "you can adjust your prices either up or down" (Tr. 2015); that it is his company's decision if they wish to charge a price other than the Coors' suggested price, and they would notify the Coors Brewery before they put the price into effect (Tr. 2016).

15. James Edward Davies.

James Edward Davies of Fullerton, California, sales representative for Adolph Coors Company, testified (Tr. 2017-2055) that he had been in that department for three years in June (Tr. 2017). Mr. Davies studied psychology at the University of Colorado and has been employed by Adolph Coors for five years (Tr. 2018). He first started to work in the Hospitality Center, went into the Sales Training Program, and then called on retail accounts in the Denver area for a short time (Tr. 2019-2021). He was first transferred to a field position in southern California where he is now working from the San Fernando Valley south along the coast to San Diego taking care of ten distributorships (Tr. 2022). Mr. Davies meticulously outlined the duties in detail of a sales representative, emphasizing how he monitored the distributorships to determine whether or not they were being conducted in compliance with Coors' policy manual (RX 1047 E, F, & G; Tr. 2023-2030). Mr. Davies testified as to various form he uses in conjunction with his work as a sales representative (Tr. 2030-2039). Mr. Davies explained CX 777 by stating that when he first went into the area he corrected the wording on territorial descriptions for various distributors (Tr. 2041). Under cross-examination by complaint counsel, Mr. Davies explained that he did not tell each distributor of his (Davies') evaluation at each visit, although he felt it was very important (Tr. 2043). He stated that pricing was never discussed in any of the marketing committee meetings he attended (Tr. 2045).

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He stated that communications meetings and marketing meetings were held approximately every three months (Tr. 2045). He stated that it was possible that pricing policies could have been discussed at communications meetings, although he did not recall for sure (Tr. 2046). He recalled discussing 11-ounce pricing on both the 6-pack and the loose package (Tr. 2047). No recommendations were made based upon these discussions (Tr. 2048). Upon further cross-examination, he recalled discussions of distributorships succession at communications meetings (Tr. 2051). He

reported, upon cross-examination, that there had been two changes in distributors ownership in his area since he took it over a few years ago (Tr. 2053).

16. Don L. Maurer.

Don L. Maurer of Safford, Arizona, the present Coors distributor in that city, testified (Tr. 2055-2061) that from 1966-1970, he had been a Coors representative (Tr. 2056). In conjunction with that work, he had actually authored CX 112, CX 48 A and B, CX 396, and CX 421. Mr. Maurer explained in detail the language contained in those reports (Tr. 2056-2061).

17. Lesley A. Kroeger.

Lesley A. Kroeger of Oklahoma City, Oklahoma, testified (Tr. 2061-2072) that he is now employed by the Coors Distributing Company in Fort Worth, Texas, after having recently taken a position there (Tr. 2061). He testified that from 1959-1969, he had been a sales representative for Adolph Coors Company covering portions of the states of Colorado, Utah, and Texas (Tr. 2062). He was given Commission exhibits CX 257, CX 298, CX 287, CX 253, CX 256, and CX 176. He explained in detail relevant portions of said reports (Tr. 2062-2065). Upon cross-examination, Mr. Korger related how Texas authorities had complained to him that Coors Beer had been found in territories outside territories of existing distributors (Tr. 2067).

18. Donald Straub.

Donald Straub of Pleasant Hill, California, sales representative for the Adolph Coors Company, testified (Tr. 2072-2079) that he has been with the comapny for 17 years (Tr. 2073). He stated that he was located in the present area in which he now lives in the State of California for a period of 12 years

and calls upon the Bay area distributors around San Francisco and Oakland (Tr. 2073). He was given CX 45, CX 774, CX 490, and CX 968, and explained in detail the circumstances surrounding those reports (Tr. 2073-2076). Under cross-examination, he described in his own words what he meant by market penetration and indicated that he tried to get all packages into all accounts in a given territory (Tr. 2076).

19. Paul Carroll.

Paul Carroll of Oklahoma City, Oklahoma, testified (Tr. 2079-2093) that he was a present sales representative for the Adolph Coors Company in western Oklahoma, and had been employed by the company for five and one half years (Tr. 2079-2080). He was given CX 125, CX 126, CX 129, and CX 1950, and explained in narrative language the meanings of these reports that he had authored (Tr. 2080-2086). Upon cross-examination, he testified concerning how prices for the same package vary from distributor to distributor (Tr. 2087). He stated that the Ford Organization in Oklahoma City talked about prices all the time (Tr. 2091). On redirect examination, however, he states that Ford never requested a price increase from anybody to his knowledge (Tr. 2091).

20. James Haden.

James Haden of Casper, Wyoming, a sales representative for the Adolph Coors Company of ten years duration was called next (Tr. 2093-2106) by the respondent. He was given CX 107 and CX 111 and asked to explain portions of those reports in detail (Tr. 2094-2095). Mr. Haden said that as to the former, the price increase was due to the glass price hike (Tr. 2094). As to CX 111, he stated that George and Mike Maloof utilized the cost information, market conditions, and pricing philosophy and came to a mutual understanding as to what their laid-in prices would be in their various eight or nine warehouses in New Mexico and these were approved by Mr. Eke (Tr. 2095). In spite of instant cross-examination by the complaint counsel as to his participation in the setting of prices in the State of New Mexico, Mr. Haden stoutly maintained that the Maloof boys "took the information and

sat with their managers. I don't know who they sat down with. I wasn't there. They determined between themselves what they would sell their product for" (Tr. 2098).

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21. George Callahan.

George Callahan of Sacramento, California, testified (Tr. 2106-2117) that he was employed by the Adolph Coors Company, and had been for six and one half years as a sales representative (Tr. 2106). He testified that he had been a representative for the Ford Organization in Oklahoma City in 1969 (Tr. 2107). He was given CX 157 and CX 158, and asked to explain both exhibits. He detailed how the 15-ounce can prices set forth in CX 157 were caused by the increase in the size and form of a 15-16 ounce can (Tr. 2107). As far as prices are concerned that are mentioned in CX 158 that he obtained, Mr. Callahan stated that he got those prices from the local purchasing office of those particular stores in Tulsa, Oklahoma (Tr. 2108). Under cross-examination, he denied taking any suggested prices to these retailers, but instead was given these prices by the retailers themselves (Tr. 2108-2109).

22. Richard Maxwell Burwell.

Richard Maxwell Burwell of Yuba Linda, California, testified (Tr. 2123-2151) that he was employed by the Adolph Coors Company as a sales representative and had been in southeastern California since January 1971 (Tr. 2123). He stayed in the Hilton Hotel in Denver during the time he testified and, when he ordered a glass of Coors draft beer, he was served Schlitz instead (Tr. 2124). Mr. Burwell explained in detail CX 6, stating that the words "Art has agreed" actually were a poor choice of words in that they had discussed prices, and Mr. Pearce had advised him what his prices were going to be (Tr. 2125). He discussed CX 12, CX 26 A-B and CX 28 A, and explained the relevant portions thereof (Tr. 2125-2129). During cross-examination by Commission counsel, the following question was asked (Tr. 2131):

"Q. You were describing a general procedure in which you had suggested prices to him, he decides a price and then you report that to the brewery. Now, that is a general procedure you follow, is that what you are saying?

"A. Correct.

Mr. Burwell related that some distributors use a 30-day split policy and find it effective whereas other distributors do not (Tr. 2144-2145). These policies are established

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by the distributor and not the brewery (Tr. 2148).

23. Richard Whipple.

Richard Whipple of Albuquerque, New Mexico, testified (Tr. 2152-2164) that he is employed by the Adolph Coors Company as a Marketing Representative and presently serves in the State of New Mexico (Tr. 2152). He explained in detail CX 406, and the allocation procedures involved during beer shortages (Tr. 2153). He explained in detail the term "retail price control" (Tr. 2154). He also testified as to the beer substitution earlier commented upon by Mr. Burwell (Tr. 2156).

24. Ken Hayes.

Ken Hayes of Arlington, Texas, Marketing Representative for the Adolph Coors Company, testified (Tr. 2165-2178) that after he had previously testified in the matter, he returned to Dallas and Fort Worth, Texas, and made a retail pricing survey (Tr. 2165). He testified as to the sampling of 277 accounts in Dallas, and 162 accounts in Fort Worth that were surveyed (Tr. 2166). The price range in Dallas was from $1.29 to $1.75 and the price range in Fort Worth was $1.09 to $1.80 for 12 ounce cans (Tr. 2166). Quart prices in Dallas during this same period ranged from 53 cents to 62 cents and in Fort Worth from 53 cents to 60 cents (Tr. 2167). Mr. Hayes testified concerning CX 684, and related why he was

concerned about Mr. Tinetti's participation in meetings with other distributors where pricing was discussed (Tr. 2168). Mr. Mayes explained the relevant portions of CX 908 A-B (Tr. 2169-2170).

25. Dr. Jack S. Wolf.

Dr. Jack S. Wolf of Amherst, Massachusetts, was called next (Tr. 2178-2254) by the respondent as an expert in the field of marketing (Tr. 2180). Dr. Wolf testified as to extended experience in the alcohol beverage industry (Tr. 2182). He explained how the distribution of beer started after prohibition (Tr. 2184). He stated that national and regional distributors now distribute their beer through wholesalers and that there is considerable rivalry and competition between brewers and wholesalers, all of whom attempt to penetrate the market (Tr. 2185). He explained that distributors have limited territories in which they operate (Tr. 2189). He stated that "brand image" has a great deal to do with why a person prefers

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one brand of beer over another (Tr. 2194). He explained in detail the difficulties the respondent has as a regional brewer with its single plant operation (Tr. 2198). He described inter-brand competition as "severe" (Tr. 2199). Dr. Wolf stated that one of the reasons for territorial limitations was intensive marketing penetration and quality control (Tr. 2202). He also indicated law enforcement was an important reason for territorial restrictions on distributors (Tr. 2202). Product availability and distributors' accountability were other reasons for territorial restrictions (Tr. 2204). He stated that territorial restrictions greatly enhance competition (Tr. 2205). He described in detail the effect of the elimination of territorial restrictions upon the beer industry. Wheeling and dealing would commence, big retailers would play one wholesaler against another, trade practice violations would become widespread, small accounts would suffer, the number of brands would be reduced and after momentary price reduction after the original "blood bath," prices would rise because of an absence

of competition (Tr. 2206-2209). Dr. Wolf revealed his part in RX 1079 (Tr. 2209). Under cross-examination, Dr. Wolf related that price competition is good competition when it doesn't destroy an image (Tr. 2216). He indicated that continual discounting would adversely affect a consumer's attitude toward a certain brand (Tr. 2218). Under further cross-examination, Dr. Wolf verified that certain efficiencies in the beer industry would result from vertical integration (Tr. 2225). Dr. Wolf stated that if territorial restrictions are not contained in a distributor's contract, nevertheless he understands that he would so limit his activities (Tr. 2241).

26. Dr. John Byrten.

Dr. John Byrten of Denver, Colorado, a research economist employed by the University of Denver Research Institute was called (Tr. 2255-2291) as an expert in marketing and statistics (Tr. 2255) Dr. Byrten performed a market research study involving beer distribution of five Coors distributors in the greater Denver area in the latter part of 1971 (Tr. 2259). He fully explained how he made the study and detailed at length what would happen if territorial restrictions on these five distributors were eliminated (Tr. 2260-2264, 2269-2272).

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27. Max D. Abbott.

Max D. Abbott of Golden, Colorado, a Divisional Sales Manager of the Adolph Coors Company, (Tr. 2293-2331) responsible for the states of Colorado, Utah and Wyoming, stated that he had been employed by the company for twelve and a half years (Tr. 2294). Previously to his present responsibilities, Mr. Abbott had been a Sales Representative and in that connection reiterated the circumstances surrounding RX 500 and RX 825 A-B (Tr. 2295-2296). He explained the differences in the seven ounce can price of $2.77 to $2.38 in various parts of California (Tr. 2297). He is very familiar with the overall pricing of Coors beer and stated that the prices were considerably higher in the State of Wyoming than in other areas (Tr. 2315). He stated that he could tell the

difference in beers from a taste standpoint and that he had observed split draft accounts in Colorado, Utah, Wyoming and California over the past 12 years (Tr. 2317). Under cross-examination, he stated that if he and a distributor disagreed on pricing, the distributor would have to make the decision (Tr. 2318). He commented at length on the recycling program of the Adolph Coors Company and the manner in which it is operated (Tr. 2323-2326).

28. Earl Charles Corder.

Earl Charles Corder of Golden, Colorado is a Divisional Sales Manager of the Adolph Coors Company (Tr. 2332-2368) with responsibilities for the states of Arizona and California (Tr. 2332-2333). Prior to that time, he was a Sales Representative in the State of California (Tr. 2334). He reviewed CX 835, and stated that the second sentence starting with the words "Could all agree that," meant that all the people together at the meeting had agreed that it would be a fair price (Tr. 2335). Mr. Corder stated that he knew Bill Stone, a retailer in Van Nuys, California, had been in his place of business, and that he had five light beers on draft, Coors being one of them (Tr. 2337). He testified as to the amount of equipment Mr. Stone had in order to serve all these draft beers (Tr. 2338). He also knew Mr. Grotewold, a retailer in Phoenix, that had both Coors and Budweiser on draft (Tr. 2339). Mr. Corder also stated that he could tell the difference between Coors and other brands of beer (Tr. 2343). Mr. Corder testified concerning the Orth-Hemphill and Safford distributor terminations (Tr. 2345-2357). He also testified with regard to problems with Mr. Barrows (Tr. 2357).

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29. Melvin E. Linn

Melvin E. Linn of Golden, Colorado stated (Tr. 2368-2453) that he was employed by the Adolph Coors Company as a Divisional Sales Manager. He has held this position for one year and prior to that time was a Sales Representative. He has been with the Adolph Coors Company

a little over ten years (Tr. 2369). In identifying RX 545-552, Mr. Linn spoke of his knowledge of the range in Coors beer prices in the State of Kansas (Tr. 2370-2371). Mr. Linn explained CX 227, CX 247, CX 277, CX 318, and CX 330 (Tr. 2382). He talked about his problems with Mr. Dixon in Del Rio, Texas (Tr. 2384). Mr. Linn commented at length on the wide variations of Coors advertised prices (Tr. 2387-2398). Mr. Linn stated that he can also tell the difference between Coors beer and other beer (Tr. 2400). He has seen split draft accounts in many areas (Tr. 2401). He discussed the pricing problem with Mr. Wagnon of Wichita (Tr. 2402). Mr. Linn, in detail, explained the relationship between the Coors Company and the Del Rio, Texas company (Tr. 2406). Under cross-examination, Mr. Linn revealed that he has asked sales representatives to pick up newspaper ads to show Coors beer selling below normal prices (Tr. 2415). Under cross-examination, Mr. Linn stated that Mr. Cecil Scott's market in San Angelo, Texas is the worst market Mr. Linn had ever seen for discounting (Tr. 2421).

30. Howard Deckard.

Howard Deckard, General Manager of Coors Distributing Company located in Denver, was next called (Tr. 2454-2460) as a witness for the respondent (Tr. 2454). Prior to that time, Mr. Deckard had been a Sales Representative in Colorado and Texas. He has been with the company for 18 years (Tr. 2455). Mr. Deckard stated that he had been in the Denver area since 1965 or 1966, and during that time the price ranges on 6-pack cans had been from $1.10 to $1.39 and on bottles had been $1.06 to $1.35 (Tr. 2456). He stated that the present price range in the State of Colorado on cans is between $1.19 and $1.39 and on bottles $1.13 to $1.35 (Tr. 2466). Deckard stated that he can tell the difference in the taste of beer when comparing Coors with other brands (Tr. 2456). He stated there are many split accounts throughout the entire state of Colorado (Tr. 2457). He had 29 split accounts in the city of Denver alone (Tr. 2457). He reiterated how he had called on the Thurman organization in Glenwood Springs Colorado in 1968 and 1970, and that it was a very poor organization (Tr. 2458).

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31. Harvey Gorman.

Harvey Gorman was recalled to the witness stand by respondent and testified (Tr. 2476-2582) further. Mr. Gorman stated that Adolph Coors Company now serves less than 50 per cent of the population of the State of Texas (Tr. 2478). When people express an interest in a Coors distributorship, they are requested to advise the company of the area in which they are interested, and the expressed interest is placed on file (Tr. 2479). Mr. Gorman directed letters of this type to both Beverage Distributors, Inc. and Thriftimart (Tr. 2480; RX 1146 and RX 1147). He emphasized quality control as one of the primary reasons for marketing through individual distributors (Tr. 2481). Mr. Gorman summed up the Coors marketing concept (Tr. 2489). He indicated (Tr. 2492) that the Coors Company controls the product as long as it is humanly possible so as to protect the quality. Mr. Gorman stated the pricing philosophy at the wholesale and retail level to be one of fair profit (Tr. 2495). He has traveled widely throughout the eleven state area and has observed in recent years, great variation in both wholesale and retail pricing (Tr. 2496). He stated that the distributor determines the prices he is to charge for the beer (Tr. 2508). Mr. Gorman stated that the brewery had no draft account policy (Tr. 2508). He reiterated that territorial restrictions are necessary for quality control, availability of product and accountability of distributors (Tr. 2509). He testified concerning the chaotic condition in the Spriggs area in Los Angeles, California, when two distributors operated in the same area momentarily (Tr. 2510). He stated that central warehousing adversely affects the quality of the beer (Tr. 2511). He stated that neither he himself nor any other agent of the Adolph Coors Company, to his knowledge, had ever used the five and thirty days termination in distributor contracts to threaten or coerce anybody in any manner (Tr. 2512). Mr. Gorman then detailed the reasons for all of the transfers set forth in RX 753 A-C. (Tr. 2513-2522). He stated that none of these turnovers were the result of any threats or coercive activities of any kind (Tr.

2522-2523). Mr. Gorman stated that for the past 12 to 15 years there were probably 30,000 sales representative reports in the active company files (Tr. 2530). Mr. Gorman stated that the Adolph Coors Company distributors served 76,848 retail accounts at the end of 1970 (Tr. 2558) and 70,612 in 1966 (Tr. 2561).

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32. Gary Vern Veber.

Gary Vern Veber of Boulder, Colorado, testified (Tr. 2582-2593) that he serves the Adolph Coors Company as Vice President in charge of Quality Control and has had the position for four months (Tr. 2582). He detailed at length the quality control measures and forms used to check the same at the Adolph Coors Company.

33. William L. Friebe.

William L. Friebe testified (Tr. 2593-2602) as the Director of Data Processing for the company (Tr. 2593). He lives in Arvada, Colorado and has worked for the Adolph Coors Company a little over 15 years (Tr. 2593). His entire testimony detailed how the computerized operation of the Adolph Coors Company allocates beer to its distributors based upon withdrawals from the distributors' warehouses and production schedules.

34. Robert E. Schmitz

Robert E. Schmitz testified (Tr. 2602-2608) that he lived in Golden, Colorado, and was employed by the Adolph Coors Company as the Manager of the Beer Ordering Department (Tr. 2603). His individual responsibilities were detailed by him in explaining how his department within the confines of Mr. Friebe's limitations actively shifted beer orders and packages to take care of extreme situations.

35. Du Rell Hoge.

Du Rell Hoge testified (Tr. 2610-2618) that he is a retailer in Las Vegas, Nevada, and handles many brands of

draft beer in four establishments; that draft beer is a very difficult package to handle; and that no one connected with the Adolph Coors Company or its distributor has ever demanded that he handle Coors on an exclusive basis.

36. Donald M. Curry.

Donald M. Curry testified (Tr. 2618-2623) that he is a retailer living in Denver, Colorado, operating Sky Chefs, Incorporated, which is the catering service that serves airports (Tr. 2619). Sky Chefs operates the concessions at Stapleton Field in Denver where has three types of draft beer and has had for two years (Tr. 2621). He has Coors,

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Miller's and Michelob and no agents of Adolph Coors Company or its distributor that serves him has ever made a demand of threat to eliminate brands other than Coors (Tr. 2622). He stated that his distributor had never suggested prices to him (Tr. 2623).

37. Andrew Stacio.

Andrew Stacio testified (Tr. 2623-2635) that he was a retailer in Dallas, Texas, operating a string of Pizza Parlors serving draft beer and they all had more than one brand (Tr. 2625). He stated that draft beer was a food item and had to be handled very carefully (Tr. 2625-2626). He testified that he had attended a draft beer school sponsored by Adolph Coors Company in Golden, Colorado (Tr. 2627). He testified that no agent of the Coors Company or its distributor had ever made any demands upon him to handle Coors beer on an exclusive basis (Tr. 2627).

38. Dr. Walter Jennings.

Dr. Walter Jennings of the University of California at Davis was called (Tr. 2672-2701) by the respondent as an expert in the filed[sic] of flavor chemistry. He defined beer as an unstable fluid which attains its maximum quality at the

moment of packaging after which it begins to deteriorate, the main factors of deterioration being temperature, time and light (Tr. 2678). All of these factors have an adverse effect on flavor (Tr. 2680). Portection against these adverse effects can only be gained in preserving it from light, storing the beer in as low a temperature as possible, and consuming it as quickly as possible (Tr. 2682). Independent investigation by Dr. Jennings revealed that his own grocer advised him that respondent maintained close control over its product in the areas of strict rotation and was, in fact, the only brewer that did this in his store (Tr. 2696).

39. Albert G. Evans.

Albert G. Evans, Executive Secretary of the California Beer Wholesalers Association, San Francisco, California, a lawyer, was called (Tr. 2701-2763) by the respondent. Mr. Evans has been employed by the association since 1960 (Tr. 2702). The membership of his organization now numbers 235 and is decreasing each year (Tr. 2702). He detailed the purposes of the trade association (Tr. 2703). He is well acquainted with Mr. Laverty, one of the witnesses for the

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Commission, in that he has been involved in several matters of litigation with Mr. Laverty (Tr. 2704). He likewise is also acquainted with Mr. Johnston, another of the Commission's witnesses, because of the same reason (Tr. 2706). He stated that he had read transcripts of the testimony of both Mr. Laverty and Mr. Johnston in these proceedings and categorized the testimonies as being evasive, distorted and inaccurate (Tr. 2706). He stated that Beverage Distributors, Incorporated would be classified as a wholesaler in the industry, yet they only sold to selected chain stores (Tr. 2709). He detailed at length, the services that his members provide for the brewers and stated that none of these services were performed by organizations such as Beverage Distributors, Inc. (Tr. 2709-2711). Mr. Evans is familiar with the codings that brewers place on their packages and in dealing with RX 1174 through 1195 on a few examples of said

exhibits, confirmed the over-age dates as testified by Mr. De Nio (Tr. 2714-2721). Mr. Evans testified that it would be an economic impossibility in the beer business for distributors to compete with one another on an intraband basis (Tr. 2736). Under cross-examination by complaint counsel, he stated that it would be economic suicide for distributors to distribute outside their territory (Tr. 2760).

40. Russell H. Hopkins.

Russell H. Hopkins, Executive Vice President of the National Beer Wholesalers Association, Chicago, Illinois, was called to testify (Tr. 2764-2794) by the respondent. He has been the executive head of the organization since 1942 (Tr. 2765). The organization has approximately 2000 members with the membership being stable for the last eight to ten years (Tr. 2765). The purpose of the organization is to serve the beer wholesalers in their best interests in the means and ways that trade associations normally function (Tr. 2765). Primarily, it furnishes information to wholesalers (Tr. 2766). Mr. Hopkins confirmed the general overall responsibilities of beer wholesalers as testified to by prior witnesses (Tr. 2766-2769). He stated that intra-brand competition in the beer industry was almost non-existent (Tr. 2769). He described the competition in the beer business as "fierce" (Tr. 2771). He described Coors as a regional brewer doing business in a limited number of states as compared with the large national brewers (Tr. 2771). He knew of the reputation of the respondent with its wholesalers and described it as being very good (Tr. 2773). He testified concerning the brewer-wholesaler relationship as

[Part 2, p. 1098]

published by the Cambridge Institute (RX 1079; Tr. 2774). The report, dated August 1968, a study conducted under the direction of The Cambridge Center for Social Studies, for the National Beer Wholesalers Association, entitled "The Brewer-Wholesaler Relationship" had this to say (p. 24):

> "Under present conditions, the wholesaler is important to the brewing industry. This was unmistakable

from the almost unanimous agreement of participants in our survey that 'the economic health of the wholesaler is just as important to the brewing industry as is a satisfactory profit for the brewer' (q. 16). * * *.

"A wholesaler is not without power to do serious financial harm to his supplier. An interesting obiter dictum we heard in interviews was: the wholesaler owns the beer, but the brewer owns the brand. One of the most important assets of a brewing company is the quality image of its brands. In a sense, this image is a property right belonging to the brewer, as such, it must be taken care of by the wholesaler; i.e., by virtue of the relationship, the wholesaler has a limited obligation to respect and not to destroy the image. This brand image can be greatly weakened in a short time by a wholesaler who lets beer accumulate in his warehouse or fails to rotate retailers' stocks, with the result that some customers eventually get stale beer. * * *.

He stated that territorial restrictions have been a part of the beer wholesaling industry since 1933 (Tr. 2782). Mr. Hopkins feels that central wholesaling will be detrimental to the industry (Tr. 2788). He recognizes that a brewer must have the right to determine qualifications for a distributor (Tr. 2788). Mr. Hopkins testified that beer prices in recent years have risen less than most other consumer products (Tr. 2791). He stated that his association had received few complaints as to any conduct of the respondent (Tr. 2792; RX 1079).

41. Paul De Nio.

Paul De Nio of Los Angeles, California (Tr. 2804-2839).[sic] is employed by the California Beer Wholesalers Association (Tr. 2804). Mr. De Nio has been with the California Beer Wholesalers Association since 1968, and prior to that time had 14 years experience with the Alcoholic Beverage Control

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Board in the State of California in the areas of business practices enforcement (Tr. 2805-2806). Mr. De Nio stated that in his 14 years with the Alcoholic Beverage Control Board, the Adolph Coors Company was never accused of any trade practice violation (Tr. 2807). In those instances where Coors' distributors were accused of trade practice violations, other brands of beer other than Coors were involved (Tr. 2807). The Adolph Coors Company has a very strict policy in which they demand adherence to all laws on the part of their distributors. Their reputation in this regard in the State of California is excellent (Tr. 2807-2808).

Mr. De Nio recently, prior to his testimony, had purchased various brands of beer from the Thriftimart stores in the Lost[sic] Angeles area that practice central warehousing (Tr. 2808). These were marked as RX 1174 through 1195 and the coded dates of packaging of these samples varied from periods of approximately six months to exceeding one year (Tr. 2808-2824). Mr. De Nio stated that all brewers have restricted territory in which their distributors market primarily for quality control reasons but also for physical and economical limitations (Tr. 2824). He maintained that territory restrictions were necessary from a law enforcement standpoint (Tr. 2824). Mr. De Nio indicated that the central warehousing system of marketing tended to result in poor efforts as far as stock rotation and quality control are concerned (Tr. 2827).

[Part 2, p. 1101]

FINDINGS OF FACT

General

The background history of the Adolph Coors Company, its evolution since its inception in 1873, the general overall description of the brewing industry today, and the manner in which Coors beer is brewed, distributed and marketed was explained in detail by William K. Coors, Chairman of the Board, President and chief executive officer of the respondent, Adolph Coors Company (Tr. 2840). Mr. Coors

has worked for the respondent since 1939 after having graduated from Princeton University and obtaining a graduate degree in chemical engineering (Tr. 2841). The Adolph Coors Company was started by the grandfather of William K. Coors, Adolph Coors, in 1873 and has been ever since that time a privately held company by various members of the Coors family (Tr. 2842). The site chosen for the brewery in 1873 is the present location of the brewery and the location has remained unchanged at this single place since 1873 (Tr. 2843). During prohibition, the Adolph Coors Company manufactured near beer and malted milk (Tr. 2843). When prohibition finally shut the brewery industry down, there had been just prior to that time approximately 1,400 breweries operating in the United States. When prohibition ended, 1935 saw approximately 750 breweries in America that had survived prohibition who were able to get back into beer production and this number has steadily declined to the point where there are now operating in America only about 70 breweries of any consequence (Tr. 2845). The decrease in the number of breweries has been due to the competition in the brewing industry (Tr. 2845). The failure to continually produce a high quality beer at a realistic price has caused 95% of the brewery failures since 1935 (Tr. 2873). Production of beer by the Adolph Coors Company in 1935 amounted to 140,000 barrels (Tr. 2860). In 1948, the Adolph Coors Company was the 49th largest brewer in America with production amounting to 470,000 barrels (RX 1057 A). The Adolph Coors Company now ranks as the fourth largest brewer in America following its three major competitors, Anheuser-Busch, Schlitz and Pabst (Tr. 2852; RX 1057 S). Production of the Adolph Coors Company in 1971 amounted to 8,500,000 barrels (Tr. 2860).

The Adolph Coors Company has as its major competitors, with possibly one or two exceptions, the other beers comprising the top ten breweries in America, Anheuser-Busch, Inc., Jos. Schlitz Brewing Co., Pabst Brewing Co., F & M Schaefer Brewing Co., Falstaff Brewing Corp., Miller Brewing Co., Carling Brewing Co., Theodore Hamm Brewing Co. and Associated Brewing Co. (Tr. 2853). Coors competes with many other brands of beer (Tr. 447). Anheuser-Busch and

Schlitz distributor organizations are well organized, well manned, well financed, and operated by very intelligent people (Tr. 1934). Coors has a substantial disadvantage to face from a competitive standpoint in that it has a single plant operation and is today the only shipping brewery left in America (Tr. 2853). All of the major breweries and some of the local breweries have plants located on each end of the Coors eleven state marketing area in the heavily populated states of Texas and California (Tr. 1848). In 1971, the average barrel of Coors beer had to travel 961 miles to its market place[sic] (Tr. 2853). In combating this, Coors must minimize its marketing costs by achieving better market penetration and minimize its advertising costs, both of which will offset the freight disadvantage (Tr. 2853). Adolph Coors Company's theory of market penetration in the same area that it marketed in in 1935 actually drops certain costs and permits Coors to better compete against the national brewers in this area (Tr. 2876). Advertising costs of the Adolph Coors Company were less than $1.00 a barrel during the year 1971, and these same advertising costs for Anheuser-Busch and Schlitz during the same period were $4.00 and up on production of 24,000,000 barrels and 18,000,000 barrels respectively (Tr. 2853). Price competition is extremely keen with the larger breweries continually offering side deals, kick-backs and other common trade-practice violations such as price promotions numbering in some instances four times a year lasting from 30 to 60 days each time (Tr. 1856) and giving away a certain number of free cases (Tr. 1857). Competition is so keen that interbrand competition will be non-existent if distributors have to turn to concentrating on intrabrand competition (Tr. 1746). Distributors of Coors beer would not have made the investment that they have made in their businesses had they not known it was the policy of Adolph Coors Company to have only one distributor in a given territory (Tr. 1747, 1864, 1915, 1923N, 1933). The number of breweries will continue to decline and there probably will only be 20 breweries in the United States in 1980 (Tr. 2881). If the top three brewers in America, Anheuser-Busch, Schlitz and Pabst, continue their recent rate of growth, they could fulfill all of the beer requirements in America by 1985 (Tr. 2881).

The major ingredients of beer are water, hops, barley and rice (Tr. 2846; RX 172, p. 30; RX 1155 D). The Adolph Coors Company has a natural supply of water that underlies its lands and the quality of this water is remarkably pure (Tr. 2847). Eighty percent of the hops used by the Adolph

[Part 2, p. 1103]

Coors Company come from Germany because of their quality and the resulting ability to impart a flavor characteristic to Coors beer that is impossible with domestic hops (Tr. 2847; RX 169, p. 28; RX 1155 D). The use of German hops is extremely expensive because first of all, they cost twice as much as domestic hops and secondly, due to the lesser bittering power, you have to use twice as much (Tr. 2847). The Adolph Coors Company has its own recognized variety of brewing barley called Moravian (Tr. 2847; RX 172, p. 30). It is grown for the Adolph Coors Company by about 1,600 farmers located in Colorado, Idaho and Wyoming (Tr. 2847-2848; RX 172, p. 30). The Adolph Coors Company will not accept finished barley that is not grown from seed furnished by the Adolph Coors Company (Tr. 2848). The last ingredient, rice, is the short grain variety and comes from the Sacramento and San Joaquin Valleys of California (Tr. 2850). It is the most expensive rice in America (Tr. 2850). From a raw material, production and packaging standpoint, Coors beer is by a substantial margin the most expensive beer made in America (Tr. 2851; RX 169, p. 32).

The brewing process is an extremely technical science that takes approximately 80 days at the Adolph Coors Company as compared to 20 days in plants of its competitors (Tr. 2855). The plant is classified as a food manufacturing plant with absolute standards of cleanliness controlled by what is called an aseptic process (Tr. 2855). The aseptic process is merely the art of deactivating microorganisms so that the beer can be microbiologically stabilized before it leaves the premises in the various packages (Tr. 2856). The Adolph Coors Company is unique in that it fabricates most of its own equipment (Tr. 2873). Coors beer is not pasteurized

any more. The elimination of pasteurization and the conversion to the aseptic process started in 1959, and took about eight years to complete (Tr. 2856). The elimination of pasteurization is an absolute necessity for a refrigerated marketing concept (Tr. 2857). In aid to this, the entire brewery is air conditioned (Tr. 2858). No other brewer in America uses the refrigerated marketing concept (Tr. 2858). Coors beer is not stored at the brewery except for a few odds and ends with 98% of the beer coming right off the packaging lines and going in either insulated railroad cars or refrigerated trailers for transportation to the distributors (Tr. 2858). The foundation of the Adolph Coors Company is the quality of its beer, and the Company was built around this (Tr. 2489), and the reputation of Coors beer as to ethics, image and quality in the brewing industry is the highest, the finest possible. (Tr. 2491-2492). Loss of quality control would mean lost customers, and a problem to stay in business (Tr. 2492-2493).

[Part 2, p. 1104]

Adolph Coors Company has many flavor and drinkability panels in order to determine particular varieties of hops, malts and other ingredients that are superior (Tr. 2869). Brewery sales representatives in monitoring distributor and retailer practices are responsible for checking on the drinkability of Coors beer through checking on product control, rotation and temperature control in the field (RX 1047 M). Drinkability and flavor are extremely important because you can tell the difference between Coors and other beers in testing these qualities (Tr. 2317, 2343, 2400 and 2456). Superior quality is a part of the image Coors beer enjoys (Tr. 2893). Absolutely uncontroverted is the fact that quality is the only thing selling Coors beer (Tr. 2896). Beer right off the packaging line is at its highest quality with deterioration starting immediately. The principal qualities affecting deterioration are temperature, time, and light, and all of these adversely affect the flavor of beer (Tr. 2678). This is extremely important because people choose one brand of beer over another because of flavor (Tr. 2681). The only way that the flavor can be protected from these damaging elements is darkened containers, storing at low temperatures, and consuming it as quickly as possible (Tr.

2682). The importance of flavor cannot be minimized because the average consumer can tell the difference in beer (Tr. 2684). Anytime you have material that is capable of being oxidized and you have oxygen present, then you have the opportunity for oxidation deterioration. You in fact have these materials in beer that are quite eager to combine with oxygen and the products of this combination are deleterious to flavor (Tr. 2695). Metallic ions also cause chemical reaction in beer containers when the beer comes in contact with the metal, which is also extremely harmful to flavor (Tr. 2695).

Coors beer is marketed in eleven states: the western portion of Texas, and all of Oklahoma, Kansas, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Nevada and California (RX 170, p. 24; RX 171, p. 4; RX 715 A-B; RX 1173 A-W). Population trends of the United States show a gravitation to this southwestern portion of America (RX 1081-1093). The beer is marketed through 166 independent distributors (Tr. 2860). There is one exception to that and that is the metropolitan Denver area wherein Coors Distributing Company is the distributor, this company being a wholly owned subsidiary of the Adolph Coors Company, and the reason for this is that it serves as a model and a research laboratory, plus giving the brewery distributorship experience (Tr. 2862; RX 170, pp. 7-8). The contracts with the distributors are written (Tr. 2862; CX 2 A-C; CX 3 A-C).

[Part 2, p. 1105]

The marketing department establishes the prices for Coors beer which is all sold at the same price to all distributors F.O.B. Golden, Colorado (Tr. 265, 261). The distributor selects the mode of transportation from the brewery, arranges for the same, and pays all freight bills direct to the carrier (Tr. 262-263). Seventy-five per cent of the beer is shipped by rail and 25% of the beer is shipped by truck (Tr. 2866). All rail cars and transportation vehicles are either insulated or refrigerated and that is part of the Coors refrigerated marketing concept (Tr. 2866). Coors beer is a very delicate and sensitive beer, and it must reach the ultimate consumer in the shortest possible time at the lowest

possible temperature because of the way in which it is brewed and packaged (Tr. 2866).

The general overall responsibilities of the distributor are set forth in the Policy Manual as a general statement (Tr. 2862; RX 1047 E, F and G). These are summarized above. Even though respondent's exhibit 1047 E, F & G, the general statement of the Distributor's Policy Manual, was added in November of 1971, it merely is a written statement of what has been the policy for many, many years and this was recently written down so that the younger distributors would have no misunderstanding as to what the general overall policy of the Adolph Coors Company was in respect to what it generally expected of its distributors (Tr. 1738, 2484). The distributors and the retailers have a lot to do with the image and the product and the consumer preference for a particular brand (Tr. 2910). The image of Coors is extremely important and success without it is impossible. Strict adherence to regulations and laws, people that are outstanding in their communities and superior quality are parts of the image that Coors beer has (Tr. 2893).

Many suggestions are made but distributors certainly aren't terminated if they fail to follow the recommendations of the Company (Tr. 277). There are countless examples of distributors disregarding suggestions of their representatives and this caused no particular problem even as testified to by the Commission's own witnesses. An example of this is found in Mr. Tinetti's testimony concerning draught beer cleaning (Tr. 1544). The operation of Coors' distributorship is an extremely complicated business and depends upon many things other than beer sales (Tr. 1505, 1552). Among the important things that are considered by all successful Coors distributorships are community affairs, political activities, equipment, personnel, and similar matters (Tr. 1506).

[Part 2, p. 1106]

A good Coors distributor must pay particular attention to all the rules and regulations that apply to the beer business (Tr. 1796). Coors distributors are usually married men with

families and belong to their state and national wholesaler's associations (Tr. 1797). The distributors also take part in the religious activities of their communities in strong religious sections of America, often serving as members of official boards of various churches (Tr. 1869). Coors beer wholesalers or distributors almost without exception are active in the state wholesaler associations by being officers or directors thereof (Tr. 1888, 2009, 1982, 1945, 1923 Q, I, 1869, 1853). Oftentimes distributors seek advice from the Brewery, obtain it, and they are grateful for the help that the Brewery gives them from time to time in straightening out problems in their operations (Tr. 739, 740). In some instances, they even go to the Brewery to discuss problems and the Brewery's philosophy is generally to decrease the expenses, cut out all dead wood, and operate more efficiently (Tr. 744). Coors' distributors, generally speaking, have new warehouses that are fully refrigerated, identified with large Coors signs, and deliver beer in clean trucks from clean warehouses because cleanliness is so important to the image and success of the business (Tr. 1799). A successful Coors distributorship depends upon all lines of the Adolph Coors Company being available to each retailer (Tr. 559, 1365). The distributorships are very often held by families and passed on generation after generation (Tr. 1317, 1869). Adolph Coors Company has considered distributing its own beer itself and from a monetary standpoint it is extremely tempting to the Company (Tr. 2906, 2907).

The sales representatives are guided by that portion of the Policy Manual marked "Representatives" (Tr. 242). The Adolph Coors Company has 20 to 25 sales representatives (Tr. 249). These sales representatives report direct to Mr. Corder, Mr. Linn, Mr. Golightly and Mr. Abbott, the territorial managers (Tr. 252). Included in a representative's responsibility is the writing of reports, sending factual information back to the Brewery on the progress of the distributor and the way that they care for and control the product to see it is taken care of (Tr. 1053, 1077, 1078, 280). There is no particular format for these reports (Tr. 280). Reports often contain mistakes (Tr. 1173). The performance of the distributors is checked by representatives (Tr. 2863). Retail stock

levels and inventories are monitored

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to guarantee rotation (Tr. 2874). From time to time Coors representatives are to check Coors and competitive prices in retail areas and to report changes to the Brewery (RX 1047 Z-73, para. 4). The distributors have the responsibility and control of the beer until it reaches the ultimate consumer and a representative described his job as seeing to it that the distributor fulfills this responsibility (Tr. 1052). The representative is a link between the Brewery and the distributor (Tr. 1078; RX 496-523 A-E, inclusive). This link is necessary because the image, property rights, trademark, and products of the Adolph Coors Company, over which it never loses risk and responsibility, must be controlled and protected. These risks and responsibilities even continue until after consumption by the ultimate consumer (RX 1056 A-F, RX 1068 A-B).

There has been a chronic beer shortage at the Adolph Coors Company for many years (Tr. 2876). The shortage of Coors beer over the past few years is real and not artificial (Tr. 2880). Adolph Coors Company has a policy in its Manual requiring equitable treatment of all retailers, regardless of sales volume and area, in times of beer shortage and outlawing preferential or discriminatory treatment of retailers (RX 1047 F). The brewery produced at over capacity during the year 1971 (Tr. 2912). There is no way that the Adolph Coors Company can supply the demand for Coors beer, even in their limited marketing area (Tr. 2889). The Adolph Coors Company puts practically every resource it can generate into plant expansion to keep up with the demand, yet demand exceeds supply (Tr. 2877). Witness Danenhauer has been continually short of beer ever since he has been a Coors distributor (Tr. 443). Distributors have been told not to take on any more draft accounts (Tr. 443). A Commission witness stated that he has been short of beer on and off for many years (Tr. 514). Another Commission witness stated that he hadn't had enough beer in the last several years to take care of his own territory, let alone any other territory (Tr. 560).

Another Commission witness stated that he has been short of beer ever since he has been a Coors distributor and he was out of two packages of beer the very week he was on the stand testifying (Tr. 635). There is not enough beer available for the Dallas market to supply the demand and that has been the situation almost regularly ever since the Dallas market opened up in 1966 (Tr. 688-691). A California retailer called by the Commission admitted that he didn't think there was a shortage, but went out in the market to confirm it and found in fact that there was a shortage of Coors beer (Tr. 1310). Another Commission witness testified that the demand for Coors beer

[Part 2, p. 1108]

greatly exceeds the supply, and there has always been a shortage of Coors beer (Tr. 1503). Coors didn't expand into the new Texas markets until 1966 because it didn't have enough production for those areas until that time. A Commission witness knew there was a beer shortage in his territory, but at the same time he admits that he asked Coors for more territory knowing at the time that he asked them that they couldn't take on any more territory because they were short of beer (Tr. 1606). When shortages occur, on several occasions distributors have had to ration beer among the retail outlets back as far as 1963 (Tr. 1789). The distributors report withdrawals and the computer system at the brewery correlates the withdrawals from the distributor's warehouses with the supply of beer which is invariably inadequate. The computer then comes up with an allocation as to how the beer is to be loaded and shipped to each individual distributor from the packaging lines (Tr. 2864, 2593). Maximum beer inventories recommended by the brewery are 15-18 days supply during the peak summer months (RX 182F). A large retailer in California called by the Commission admitted that the Adolph Coors Company must allocate beer, and the distributors can only give the individual retailers so much beer during a shortage (Tr. 1310). Complicating the problem is the fact that each individual state has various restrictions on containers, labels and cartons which dictates that the beer coming off of the packaging lines has to be destined at a

particular time for a particular place (Tr. 2865). The Adolph Coors Company requires that both the shipper and the distributor move the beer to the consumer as fast as possible (Tr. 2874).

Fifty per cent of the employees of the Adolph Coors Company are involved in construction work as far as expanding the brewery (Tr. 2880). Survival is the only factor that entered into the decision to keep the Company on a constantly expanding basis (Tr. 2918). In 1980, it is expected that there will be no more than twenty breweries in America and the Adolph Coors Company intends to be one of the twenty (Tr. 2881). The availability of resources is the only thing that limits the ability of the Coors Company to grow, and all of these resources are internally generated. There was no evidence presented concerning any mergers. Although the founder of the Company borrowed money, the second generation never borrowed any money and the present generation, the third, has never borrowed any money (Tr. 2918). Only 2% of the total cash flow is paid to the stockholders of the Company (Tr. 2919).

[Part 2, p. 1109]

The Adolph Coors Company started the development of the aluminum can back in 1954 through its wholly owned subsidiary, the Coors Porcelain Company (Tr. 2871). The Adolph Coors Company is now totally converted to aluminum cans (Tr. 2871; RX 169, p. 10). The aluminum cans are superior because they are only a two-piece can rather than a three-piece can and in addition thereto, there is no weld on the main body. Joints and seams cause unsanitary conditions and interaction between the beer and the metal as beer eats through the lining at these points (Tr. 2870). The refrigerated marketing concept also dictated the development of the aluminum can (Tr. 2869). The aluminum recycling program as initiated by the Adolph Coors Company has created a favorable image from an environmental standpoint (Tr. 2894).

The Adolph Coors Company also has a bottle recycling program, the success of which depends on good retailer

relations between the distributor and the retailer (RX 175 H). The public acceptance of the recycling program is obvious in the nature of the increases which have been experienced in the can return program (RX 170, p. 3).

In recent times, the last fifteen years, there have only been three distributorships terminated, namely, Spriggs in Los Angeles, Orth and Hemphill in Oakland and the Safford, Arizona distributorship (RX 752 A-D). The Spriggs termination was not much of an issue in this case. The Orth and Hemphill distributorship posed constant and recurring problems dating from 1964, such as being out of beer, poor rotation, lack of refrigeration of beer and lack of sales effort (RX 992 A-C, RX 1002) and including use of dirty signs, dirty draft equipment and unkempt premises in general (RX 993 A & B, RX 994 A-C, RX 1003) and old trucks in poor condition and appearance (RX 997). The distributorship refused to correct problems after they had been pointed out to them by Coors sales representatives and management officials, especially in 1967 (RX 997), and in 1968 (RX 999, RX 1000, RX 1002, RX 1003, RX 1004, RX 1005). The only recourse for the Adolph Coors Company was to terminate Orth and Hemphill and to seek another distributor for the market (RX 1005, RX 1006). Subsequently, the Adolph Coors Company approved an applicant who did negotiate a purchase agreement with Orth and Hemphill, but they refused to sign the agreement with him (RX 1007). They admitted that Mr. Gorman gave them permission to sell the Coors phase of their business as far as the goodwill was concerned (Tr. 1390). They were offered $48,000 for the Coors portion of

[Part 2, p. 1110]

their business goodwill (Tr. 1407). The offer was later withdrawn by the gentleman who made it and the Coors Company didn't have anything to do with it (Tr. 1410). Mr. Hemphill admits that they have sued the Adolph Coors Company (Tr. 1404). Exhibits RX 902 through RX 913 are samples of sales reports from October 19, 1968 through October 17, 1970 that furnished the proper background reasons that brought about the Safford distributorship termination which was

initiated by the letter of termination written by Mr. Gorman to the organization dated January 8, 1971 (RX 914 A-B).

The transfer of distributorships can arise for a number of reasons (RX 753 A-C) and even though Mr. Gorman testified in detail as to the terminations or turnovers that have occurred recently, some of them deserve specific mention. For instance, in the Danenhauer distributorship, he reached that agreement with the Steinhoff people and it was an agreement of his own choosing (Tr. 429). Mr. Barrows had only one serious disagreement with the Brewery and that was when he sold out (Tr. 769). The reason for the disagreement was that the Coors Company felt that even though the teamsters struck, the consuming public had a right to have that beer and they wanted him to operate during a period of labor strife with non-union help (Tr. 769). Mr. Carskaddon sold his Coors distributorship because he was requested by the Coors Company to do so (Tr. 1493). Mr. Carskaddon had constant problems in running his distributorship, including a tendency to follow and to join with competitive distributors in his trade area rather than to provide his own decision making and leadership in his own distributorship (RX 812 A-B, RX 813 A-B). He was able to locate a buyer by the name of Ed Donaghy (Tr. 1498) whom he had known for many, many years and had often referred to him as his nephew as he in a large part actually raised Mr. Donaghy (Tr. 1508; RX 819, RX 814 A-B). When he took Mr. Donaghy to the Coors Company, Coors officials said fine, and his attorney, Mr. Jackson, negotiated the sale with Donaghy and Donaghy is the present distributor in Fresno (Tr. 1509). The sales price was never discussed with anyone from Coors (Tr. 1513). Mr. Tinetti had a history of management problems in his organization and in discrimination in faovr of Olympia (RX 830, RX 831, RX 844 A-B, RX 845, RX 848 A-B). Mr. Tinetti ultimately decided to keep Olympia brand and to sell the Coors brand (RX 835) and he sold his Coors operation setting his own terms with the seller (RX 828) and producing his own buyer whom the Brewery approved (RX 827) and freely handled all the negotiations on

his own terms (RX 831, RX 833). Coors gave Tinetti a chance to sell (Tr. 1546). Tinetti was free to select his own buyer (Tr. 1530). The management problems in the Del Rio, Texas, organization while Mr. Dixon was in partnership with a Mr. Reynolds were serious enough to warrant a consideration by Mr. Dixon and Mr. Reynolds to sell the Coors distributorship (RX 1111 A-B). Their asking price at that time was too high and the purchaser turned it down. In this purchase price matter, the Adolph Coors Company informed the distributorship that Coors would not get involved in the amount that was to be paid for the distributorship (RX 1112). From 1969 through 1971, the distributorship showed no substantial progress whatsoever (RX 1113, RX 1115). Mr. Dixon admitted he was told he would be given 90 days to straighten up his situation and he was given the reasons as to why the Coors Company felt he wasn't doing a good job (CX 2477 A-B; Tr. 1575). He was suspended by the Texas Liquor Control Board for violations (Tr. 1598). He went out and negotiated the sale of that business and he subsequently entered into a contract for $193,000 and the Coors Company didn't take part in the transaction in any way, shape or form (Tr. 1601). Mr. Jay Thurman purchased the Glenwood Springs, Colorado Distributorship in May 1968 (RX 867) and during his tenure as a distributor from the very outset had constant problems (RX 872, RX 873 A-B, RX 874 A-B, RX 875 A-B, RX 876 A-C, RX 877 A-C) including mismanagement involving short checks in payment for beer (RX 879 A-C); being short of beer (RX 881 A-C); and very poor retailer relations (TX 883 A-B, RX 886, RX 885). Ultimately, the Adolph Coors Company suggested that Mr. Thurman consider selling his business (RX 890 A-B) as Mr. Thurman had sought to find a buyer upon his own even prior to that time (RX 889). Mr. Thurman gave up the management of the distributorship to his father and another older man and terminated his relationship with Coors on a voluntary basis (RX 894 A-B, RX 895 A-B). After unsuccessful operations for a period, Mr. George Thurman, his father, and his associate, Mr. Finley, Jay Thurman's father-in-law, decided to sell the distributorship. They determined their own asking price (RX 897 A-B), and they made their own contract arrangements and basic selling terms with the purchaser they selected who

was approved by the Brewery, Mr. Fox (RX 898 A-B, RX 899 A-C). Mr. Thurman admitted that he a credit problem with the Brewery (Tr. 1470). Mr. Thurman admitted that he gave the Brewery short checks (Tr. 1471). When he got into the beer business, he admitted that he had never been it[sic] before (Tr. 1451).

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When in fact he did sell his business, an attorney represented him throughout the entire sale of the distributorship and he, Mr. Thurman, didn't take any part in the negotiations (Tr. 1435, 1437). Mrs. Bard, the San Bernardino distributor, at one time had additional warehouses in Indio and Yucca Valley and decided she wanted to reduce her territory and she asked the Coors Company to find her a buyer (Tr. 1772). The Company found Mrs. Bard a buyer, and she liked the appearance of the two gentlemen sent by the Adloph[sic] Coors Company very much (Tr. 1733). She subsequently sold to these two men on her own terms because of her own desire, and the Adolph Coors Company did not dictate anything concerning the sale (Tr. 1773).

The Adolph Coors Company in its Policy Manual has a general policy in regard to distributor selection, deletions or terminations (RX 1047S). At the present time, there are 167 Coors distributors and on file at the Company are 7,000 persons who are interested in becoming Coors distributors (Tr. 2477-2478). Distributors are actually chosen after a series of interviews by the Marketing Department (Tr. 266). The original interviews for the picking of a distributorship are held out in the field (Tr. 568). The interview team does not take any position on what the applicant tells them, they just accept their comments (Tr. 1133). No one questions the absolute right of the Adolph Coors Company to pick its own distributors. This point was emphasized by one of the witnesses for the Commission (Tr. 1309). Coors distributorships are very often family organizations for long periods of time. No one has ever paid the respondent anything to become a distributor (Tr. 1352, 1895, 1547, 1911, 1392). All

Coors distributors must have sufficient refrigerated space maintained at a temperature of or below 50° F. to accommodate all packages in sufficient recommended quantities to insure and maintain the drinkability and flavor of Coors beer in order that the consumer is assured of receiving the finest product possible. In furtherance of the refrigerated marketing policy, the distributor and his organization must continually sell the retailer on the program of having sufficient, recommended refrigerated capacity for all Coors packages, thus assuring the consumer of a more drinkable product with the advantage of satisfied customers and additional sales (RX 1047V). The Coors sales representative is to present refrigerated marketing programs to distributors and their personnel so that such distributors and their personnel are in a position to convey the same to retailers and customers in pointing out the advantages of rotated, refrigerated, Coors beer (RX 1047 V). It is the basic responsibility of the distributor to take care of and

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monitor temperature control of Coors beer from the time the distributor receives the beer until he places it in a retail outlet, and further, he must thereafter guard against the abuse of Coors beer, such as lack of rotation, lack of refrigerated storage, at the retail level (RX 1047 V). All of the Coors distributors are in complete accord with the refrigerated marketing concept and agree with that philosophy 100% (Tr. 689). Even retailers, as exemplified by one of the two retailers that testified in favor of the Commission, think that beer is better if it is stored cold (Tr. 941). New warehouses have been built to aid this concept (Tr. 1364, 1799; RX 1048). The refrigerated marketing concept dictates that the distributors refrigerate their warehouses (Tr. 2874). The distributors are now taking the next step by going to complete refrigerated trucks and this program has already started (Tr. 1802, 2875). The emphasis in recent years has been on controlling the quality of the product after it has left the Brewery and the refrigerated warehousing, transportation and delivery trucks are examples of that emphasis (Tr. 2489). Refrigeration and rotation are absolute musts as far as quality

control is concerned (Tr. 2493). The distributor, of course, has the initial basic responsibility of taking care of the rotation of Coors beer so that retailers and consumers handle and purchase Coors beer in the finest possible condition (RX 1047 F, para. 10). It is extremely important to keep beer fresh, and it must be rotated to see that this is done. Inasmuch as the retailer cannot be depended upon to do this, the Adolph Coors Company places this responsibility on its distributors who must see to it that each retail account has only enough beer on inventory to get him by until the next delivery date (Tr. 1088). Retailer inventory is a part of this rotation program and that is the reason the retailer inventories must be controlled (Tr. 1089). Beer is as good as it is ever going to be the moment it is packaged, and it deteriorates in flavor with each passing day (Tr. 1297). If representatives of the Coors Company find old beer in the territory, it is destroyed and the distributor has to suffer the loss (Tr. 1369).

During the interviews for his distributorship no one asked Mr. Cecil Scott whether or not he would handle a conflicting line of beer (Tr. 569). When the Orth and Hemphill organization took on Coors in 1958 they had Regal Pale, Pabst, Champale, and Mexicali (Tr. 1378). Mr. Carskaddon

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had Coors when he took on Olympia (Tr. 1502). Mr. Tinetti distributed many other brands of beer and at the time he sold Coors out, he was distributing Coors and Olympia (Tr. 1519). Mr. Coleman, the Coors distributor in Brownwood, Texas, had Jax beer when he was chosen as the Coors distributor in 1966 (Tr. 1845). Mr. Boersma became the Coors distributor in 1946 and prior to that time had other brands of beer and now handles Schlitz and Coors (Tr. 1861). Mr. Maloof in the entire state of New Mexico handles other brands of beer, mainly Pabst and Burgermeister (Tr. 1902). When Mr. Lee Scott became the Coors distributor in 1967 at Boise, Idaho he was actively selling Olympia beer and at the time he applied for the Coors distributorship, the Coors people knew this. Mr.

Scott discussed it with the Coors people and told them how he was going to operate with both brands and Coors didn't tell him he had to get rid of Olympia (Tr. 1923 A). Mr. Tinetti took on Olympia after he had Coors and no representatives of Coors told him not to take on Olympia (Tr. 1534). When Mr. Clymer took on Coors in 1966, he had Falstaff and Miller and the Coors Company didn't make any demands upon him that he had to get rid of them (Tr. 1939). Mr. Wagnon handles Pabst, Carling, Colt 45, Heinekens, Metz and Falstaff (Tr. 450, 451). Ford Distributing Company in Oklahoma City, the largest Coors beer distributor in its eleven state marketing area, has handled many other brands of beer, including Pabst, Miller and Schlitz (Tr. 1981). Martin Schinnerer, a distributor in Long Beach, California, has been with Coors since 1936 and over the years he has distributed a majority of the brands of beer and he now distributes Coors, Olympia, Schlitz, Hamms, Colt 45 and Budweiser (Tr. 2000). Mr. Stemach, the Coors distributor in Eureka, California testified that he now handles Olympia, Miller, Country Club, Coors, a lot of wines, and that no one in the Coors organization has ever told him to get rid of those brands (Tr. 1923 P). Consumer choice results from the brand image, which again is basically a matter of taste, product, and quality control (Tr. 2194), and any brewer must attempt to protect the quality of his beer until it is consumed by the public. This requires that the Adolph Coors Company must maintain some element of package care, if you will, to insure quality of product (Tr. 2198). If possible, Coors must protect that quality of product from the time it leaves the brewery all the way to when the purchaser at home puts it in his refrigerator (Tr. 2195). A good wholesaler or distributor of Coors beer will follow that product to the consumer to make sure the consumer purchases Coors beer which

[Part 2, p. 1115]

is in a condition consistent with the consumer's brand image of that beer (Tr. 2195). The use of territories assigned by the brewer to his distributors is the only effective way of getting market penetration and intenstive[sic] market coverage (Tr. 2202-2203). If territorial restrictions were completely outlawed

and fully open competition between distributors of the same brand were to take place in each territory, chaos would result (Tr. 2206-2207). This kind of open intrabrand competition would result in the sacrifice of the smaller retail accounts, both on and off premise, who if serviced at all by distributors, would be required to pay higher prices and their consumers would similarly be required to pay higher prices (Tr. 2207). While the initial immediate reaction to this might be price reductions as distributors of the same brand fought one another for the large retail accounts in the given territory, once the blood bath was completed, it is very likely that prices would increase (Tr. 2208). The Alcoholic Beverage Control people fostered some of the state restrictions requiring exclusive territories (Tr. 2251). Even if beer packages could be marked to identify who sold the beer package to any particular retail account, this would be the extent of the monitoring of distributor activities that could be accomplished (Tr. 2290).

The Commission started its investigation in 1965 and filed its complaint in 1971. During this time a thorough investigation was conducted by the Commission. The Commission examined almost 30,000 sales representative reports and countless other documents (Tr. 2530). Complete cooperation of respondent is indicated by RX 700-763 and RX 1094-1107. This certainly doesn't indicate laches on the part of the government even if governmental agencies were subject to that doctrine.

[Part 2, p. 1116]

Territorial Restrictions

There is no doubt whatsoever that the Adolph Coors Company unilaterally, vertically, imposes upon all of its distributors, territorial limitations within which the distributors have full responsibility for the sale, care, control, and market penetration responsibilities of Coors beer (Tr. 1081). The Adolph Coors Company restricts the territory in which its distributors are permitted to market because, among other things, each Coors distributor is required to solicit business

from every retailer within the established trade area serviced by the distributor, which includes the provision of equal, normal, retailer services for all retailers desiring service in that trade area (RX 1047F; Tr. 1536). Further, the care and control of the product demands territorial restrictions in that minimum stocks must be maintained at the retail level (Tr. 2879).

If distributors are not limited to territories, there is no way the brewery personnel can monitor a distributor's performance. Further, the only way Coors can guarantee delivery to the smaller retail accounts is by territorial restrictions, and the elimination of territorial restrictions would in time eliminate 75% of the retail accounts, which would be the smaller retail accounts and this is the backbone of the Coors marketing concept (Tr. 2891). The position of the Adolph Coors Company is not unique in this matter of territorial restrictions in that all major brands have territorial limitations (Tr. 1950, 2824, 2010) and in some instances, Coors merely acquiesces in territories the distributors already have for some other brands (Tr. 1397). Even though representatives of the Adolph Coors Company have requested distributors to stop selling beer outside their territories (Tr. 710), some distributors have sold Coors beer outside their designated territories all the time they have been Coors' distributors (Tr. 1392, 1571, 1605).

The distributors themselves generally speaking have no desire to distribute beer other than in their own territories of responsibility (Tr. 445). There are many reasons for this, probably the first and foremost being that they don't have enough beer to take care of their own territories (Tr. 445).

[Part 2, p. 1117]

Another major reason given was that territorial limitations are necessary to properly penetrate the market and deliver quality merchandise (Tr. 562-563). The absence of territorial limitations would have a definite adverse effect on the quality control program of the Adolph Coors Company (Tr. 609). When beer finds its way outside of territories, there is no one

in those areas to see to it that the product is subjected to quality control standards as established by the Adolph Coors Company (CX 203; Tr. 708). Quality control becomes a serious problem when beer is sold outside of the territory in which it is supposed to be marketed (Tr. 710). Representatives feel that it is a part of their job to track down beer that is not properly being taken care of (Tr. 711). Some distributors maintained that they wouldn't be a distributor unless they were the exclusive distributor because they wouldn't have control over the business in order to protect the quality of the product (Tr. 1897). Most distributors maintain that it isn't economically feasible to go outside of their territories anyway (Tr. 760).

Territories must be restricted in order to fulfill the stringent laws and regulations that apply to the liquor industry for the simple reason that if in fact law violations are reported with a particular brand it is easy to determine the guilty party (Tr. 2824). The Adolph Coors Company has a reputation for strict adherence to applicable laws which is even recognized by competition (Tr. 2808). Another reason for territorial restrictions is that of strict accountability for the distributor to the brewer concerning distribution of the produce in a given area (Tr. 2826).

The Adolph Coors Company has experienced in times gone by two distributors operating in the same market and a chaotic condition resulted as far as the retail trade was concerned (Tr. 2510). It is an economic impossibility for distributors to compete with one another in the same brand (Tr. 2736, 2759). In some cases, breweries define these territory restrictions as primary areas of responsibility, but as a practical matter this causes no change in operation since in truth and in fact the distributors do not go outside this area in order to market beer (Tr. 2010, 2241-2242). The elimination of territorial restrictions would practically destroy the beer industry (Tr. 2787).

Pricing

The philosophy of the Adolph Coors Company on pricing is that the brewery, distributor, and the retailer make a fair rate of return on their investment (Tr. 2885, 1083 and 2485). The pricing policy of the brewery is contained in their policy manual (CX 248 Z-104). Respondent has no resale price maintenance program and has not put that portion of the policy into effect because it has not chosen to do so. (Tr. 1150-1151). Prices charged by the company to its distributors are uniform F.O.B. prices (Tr. 269). Price increases at the brewery have been held to a minimum in recent years, reflecting only increases in costs over which the respondent has no control (Tr. 1115).

Respondent has never made any price deal with any distributor or large franchise operator on a direct sales basis (Tr. 291). With the exception of Mr. Thurman, every witness for the Commission testified that all the Adolph Coors Company ever did was to suggest either prices or range of prices for the wholesalers and retailers of Coors beer and each individual distributor or retailer himself made the final decision as to what prices he would charge. Many distributors use as their original pricing the pricing of the former distributor (Tr. 379, 582). There is no policy of the respondent that requires distributors to have discussions with sales representatives prior to the adoption of any wholesale prices (Tr. 384, 600, 2015). Marketing representatives only suggest prices (Tr. 407, 630, 394; CX 1141). Distributors often do not adopt the prices suggested to them by Coors' representatives (Tr. 397). Distributors have no obligation to propose prices to the respondent before adopting them (Tr. 399). When distributors set prices they sometimes advise the respondent (Tr. 403, 580). Neither respondent nor any of its agents have ever threatened a distributor concerning pricing (Tr. 444, 1830). Representatives of the respondent never do anything other than suggest prices (Tr. 498). Representatives often tell distributors their prices are their own business (Tr. 506). Oftentimes distributors do not follow brewery pricing recommendations (Tr. 456, 462, 465). Distributors maintain that they set their own prices and always have (Tr. 527, 560).

Some distributors specifically refuse to adopt pricing suggestions made by Coors representatives (Tr. 539). Mr. Ward lowered his own prices in July of 1971, because of loss in sales (Tr. 536, 537).

[Part 2, p. 1119]

Mr. Cecil Scott observed that on the Friday and Saturday before he testified, a 6-pack of 12 ounce cans sold for as low as $1.09 and as high as $1.43 in San Angelo, Texas (Tr. 1842). Mr. Scott was accused of discounting by one of the Commission's witnesses, Mr. Polunsky, when in fact this was not true (Tr. 633). Many retailers threatened to quit Mr. Scott unless he started to discount (Tr. 634). Coors beer was sold in 70,612 retail accounts in 1966 and 76,848 accounts in 1970. Of all these accounts, the Commission could only locate two retailers who would testify concerning alleged price-fixing on the retail level (Tr. 2561, 2557, 2558). Mr. Polunsky admitted to being upset with the Adolph Coors Company because they don't cut the price of beer (Tr. 937). He refuses to promote Coors beer for this reason (Tr. 930). Mr. Polunsky is so biased against the Adolph Coors Company that he won't push its product even if he makes more money on it than he does on Budweiser (Tr. 937). In instances where price cutting has been observed at the retail level, sales representatives have advised the distributor to merely suggest to the retailer that he make a fair rate of return on his investment (Tr. 2394-2395). Distributor organizations, not Coors personnel, make suggestions to the retailers (Tr. 667). Retailers who continually cut the price of respondent's product continue to receive it and sell it for whatever prices they choose (Tr. 671, 2395). Coors beer is widely and continually advertised at less than the suggested retail prices and these retailers are not cut off of their supply (Tr. 695, 699). Mr. Letcher, a Commission witness, was told that once he gets the beer it was his decision to do with it what he wanted (Tr. 837, 838, 840). Coors personnel do not dictate to retailers (Tr. 845). Retailers determine what their prices are going to be (Tr. 911). Retailers often ask distributors for advice on pricing (Tr. 1366).

Mr. Hemphill in testifying for the Commission stated that Mr. Eke was very diplomatic in making pricing suggestions to him and that is why he went along with Mr. Eke's suggestions (Tr. 1379, 1380). Mr. Thurman stated that the area representative gave him suggested retail prices (Tr. 1432). Mr. Tinetti, a witness for the Commission, refused to change prices when requested to do so by agents of the respondent (Tr. 1540). Many states have price posting laws in which the manufacturer sets the retail and wholesale price of beer (Tr. 1554).

[Part 2, p. 1120]

Central warehousing wouldn't do a thing to the price of beer in California because the manufacturer sets the retail price (Tr. 1633). Distributors do not have to clear price changes with the respondent in advance, they merely report changes to the company (Tr. 1085). Representatives and divisional managers of the respondent have been told that the distributor makes the final decision on his selling prices (Tr. 1096). Representatives have been told that all they should do is discuss and recommend in the area of pricing (Tr. 1098). No one at the Adolph Coors Company approves wholesale or retail prices (Tr. 1103). The respondent does not make price agreements (Tr. 1108). The respondent feels that retailers ought to make a reasonable mark-up (Tr. 1141). No retailer has ever been cut off because he didn't follow a suggested price (Tr. 1149). It is not the policy of the Adolph Coors Company to favor a uniform price at the retail level (Tr. 1151). Wholesalers set the wholesale pricing and make the final decision thereon (Tr. 1171). Discounting at either the manufacturer or wholesale level damages the quality of the beer and this practice has put more brewers out of business than any other marketing device, the reason being that over-age beer in the market place[sic] results from discounting (Tr. 2895). The final decision as to the distributor's price is what he himself determines and all the brewery people can do is discuss the matter with him and hope that he comes to a desirable conclusion (Tr. 1175). Sales representatives prepare the area marketing price data sheets

and forward these to the brewery (Tr. 986). Prices contained on said sheets are merely average prices which are observed in the market place[sic] (Tr. 988, 1058). No sales representative has ever threatened a retailer with a beer shortage when discussing pricing (Tr. 1003). Distributors report to sales representatives what they are selling the beer for (Tr. 1056). Wide ranges of prices at the retail level exist (Tr. 2166, 2167). No agreements have been entered into by the respondent concerning pricing (Tr. 2104). Agents do not tell distributors to hold off on a price increase (Tr. 2115). No distributor, retailer, or any other person has ever been threatened by any representative of the Adolph Coors Company concerning pricing, territorial restrictions, exclusive draft accounts, central warehousing, and termination provisions or any other matter (Tr. 1771). Prices of Coors beer at both the wholesale and retail level are widely scattered and publicly advertised as such throughout the entire eleven state Coors marketing area, except in price

[Part 2, p. 1121]

posting states and states where advertising of prices is prohibited by law. The variations shown in RX 1148 A through 1154 D and RX 524-699, except RX 649 are examples of these extreme variations (Tr. 2496). The Adolph Coors Company absorbs increased costs on the basis of greater productivity and they expect the distributors to do the same thing (Tr. 2921). Retailers are free to charge what they choose for Coors beer (Tr. 2617, 2623, 2628, 2496). No retailer that advertises Coors beer at less than the prevailing cost has been cut off from his supply (Tr. 2498). Price of beer to the general public will go up if central warehousing is permitted to flourish and sell to limited customers (Tr. 2753). Intra-brand competition will result in higher retail prices (Tr. 2761). The ability of the Adolph Coors Company to compete depends on quality and penetration (Tr. 2889).

Exclusive Draught Accounts

Draught beer, beer that is packaged and shipped in barrels and drawn as it is served to the customer, is one of

the various packages that the Adolph Coors Company produces (Tr. 559). Draught beer is a much more difficult package to handle than other packages and you have to know your business in handling draught beer (Tr. 1504). Draught beer is just as important as any other package (Tr. 432) and when you consider profits of a company you have to consider all packages together (Tr. 1824).

Cleanliness is a very serious problem as far as draught beer is concerned (Tr. 1543, 1504, 437, 746, 1850, 1866, 1975, 1976, 1977, 2615). Cleanliness is such a serious problem that even the glasses are a continual problem in the retail accounts and Coors representatives continually check glasses and report dirty glasses to the distributors (Tr. 1545-46). The distributors have the responsibility of cleaning the draught accounts weekly and they assist the retail outlets in keeping the beer glasses clean (Tr. 1792).

Pressure is a constant problem with draught beer in that Coors beer draws at a higher pressure than other beer (Tr. 438). Substitution of brands is an extremely serious problem with draught beer (Tr. 1504, 561).

[Part 2, p. 1122]

Draught beer has to be kept cold from the time it leaves the Brewery until it is served (Tr. 1791). This is accomplished by storing it in refrigerated warehouses and delivering it in refrigerated trucks (Tr. 433). When you permit it to get out of refrigeration, secondary fermentation takes place and that spoils the product (Tr. 1542). The Adolph Coors Company is fanatical about the care of their refrigerated draught beer and a former distributor thinks that they are absolutely right in that respect (Tr. 1542). Rotation is also a critical problem with draught beer (Tr. 1542). The Adolph Coors Company has a draught beer school in which retailers are told how to care for draught beer, how to handle it, how to serve it, how to sell it, how to store it, and cleanliness (Tr. 2627).

Almost every witness that testified on the subject of split accounts stated that they had no policy against split accounts

and in fact accounts were split in their territory (Tr. 413, 561, 609, 729, 1779, 1790, 1849, 1883, 1901, 1987, 2014, 1491). Mr. Ford, Oklahoma City, Oklahoma distributor, testified that the only accounts he didn't service, including draught beer accounts, were draught accounts serviced exclusively by competitors, such as Miller's and Budweiser, and that he serviced 95% of the retail accounts in his marketing area (Tr. 1978). In some instances sales representatives have actually encouraged distributors to take on split accounts (Tr. 2063; CX 287). Evidence of split accounts was so overwhelming that Commission counsel failed to introduce into evidence records subpoenaed by the Commission from various distributors which showed large numbers of Coors' accounts split with almost all various major brands. Only through insistence by respondent's counsel was this evidence forced into the record (Tr. 1358; Rx 1108). Even though accounts do not have draught beer, or are split, they have other packages of Coors beer in those accounts (Tr. 636, 695, 1503). The Adolph Coors Company is not the only one that recognizes the hazard in split accounts, as all of its competitors likewise recognize the same hazard (Tr. 731).

Mr. Linn had split accounts in his territory as long as he could remember (Tr. 2401). There are split accounts throughout the State of Colorado (Tr. 2457). Mr. Hoge, a retailer in Las Vegas, Nevada, testified that he has four places in Las Vegas, the oldest place being 15 years old, the youngest being eight and all of them handle Coors, Schlitz, Michelob and Budweiser on tap and that no one from the Adolph

[Part 2, p. 1123]

Coors Company has ever demanded that they handle Coors on an exclusive basis (Tr. 2612, 2616). Mr. Curry, the manager of the food and concession operation at Stapleton Field, Denver, Colorado, maintains that all of the bars out there are split with at least two beers and no member of the Coors' organization has ever demanded that those splits be eliminated (Tr. 2622). Mr. Stacio, a retailer from Dallas, Texas, operates a chain of pizza parlors and serves Coors and other brands in

some of them (Tr. 2625). Mr. Stacio has attended the draught beer school in Golden, Colorado, sponsored by the respondent and never has been told to eliminate the split situation by an agent of the Adolph Coors Company (Tr. 2627).

Central Warehousing

Central warehousing for the purposes of this matter can be defined as actually a warehouse situation in which the retailer buys direct from either a brewer or distributor and takes delivery of the beer at the warehouse and then redelivers to the individual retail outlets, generally in its own trucks (Tr. 1220). Coors originally itself used the central warehouse system in distribution and discontinued it in Arizona because it was unsatisfactory (Tr. 1197). The Adolph Coors Company has determined that central warehousing has not worked for it and will not be used (RX 705 A). The Adolph Coors Company has recommended a goal to its distributors that they determine not to use central warehousing (RX 705 A). Coors has suggested that central warehousing is a very undesirable situation. (Tr. 293). Coors' agents are extremely critical of central warehousing from a quality standpoint on the basis of rotation, refrigeration and those types of matters, and as to its failure when it was tried for a short time by the Adolph Coors Company (Tr. 2511). Central warehousing has an adverse effect on quality control (Tr. 2827).

Mr. Johnston's animosity toward the Adolph Coors Company is obvious in that he hopes the Adolph Coors Company loses its suit involving the Federal Trade Commission (Tr. 1209). Beverage Distributors, Inc. has been advised by the Adolph Coors Company, just as the Company advises any other applicant for a distributorship that, when a situation presents itself in an area of their interest, they will be contacted by the Adolph Coors Company (RX 1146). B.D.I. cannot compete with regular beer wholesalers unless they

[Part 2, p. 1124]

buy at a better price than the regular beer wholesalers do (Tr. 1231, 2749). B.D.I. would only service large central warehouse

accounts (Tr. 1243). In order for a central warehouse program to be successful, it has to buy direct from the brewery (Tr. 1292). Beers that are bought for central warehousing other than private labels are a fairly insignificant portion of the California market (Tr. 1294). Cost savings shown in CX 2060 and CX 2030 A-E do not take into consideration the many services that the normal wholesaler performs that B.D.I. does not (Tr. 1252, 1284). When Miller and Anheuser-Busch were sold by B.D.I. through the central warehouse system, those two brands of beer sold for a higher price in the Safeway stores than did Coors, which was being delivered directly to the stores by the Coors distributors (Tr. 1255, 1256 and 1264).

If a retailer can't buy centrally warehoused products at a reduced price, he can't centrally warehouse them (Tr. 1627). A retailer with a central warehouse wouldn't take care of all accounts, but would sell to his own stores (Tr. 1629).

Distributors know that the responsibility for quality control is theirs, and they are unwilling to let anyone else assume that responsibility (Tr. 1794, 1795, 1984). A distributor with experience in central warehousing of a few years ago maintained that it wouldn't work because it was impractical, the distributor lost control over the product, couldn't rotate it, some stores would have twice the amount of beer they needed and others would be out and they didn't keep the beer under refrigeration (Tr. 1983). Central warehousing deals with the type of delivery, not customer restriction since Coors distributors serve all retail outlets (RX 1047 F, para. 8).

Termination Provisions

With only three terminations of distributors in the last 15 years (RX 753 A-C) it is obvious that the Adolph Coors Company enjoys great stability in its relations with distributors, and has rarely used its contractual termination powers.

[Part 2, p. 1125]

The termination provision is mutual and either the brewery or the distributor can quit the other in the thirty days without cause (Tr. 1083). The Company has never used a five and thirty day clause in the contract as a method of threatening distributors on the basis of prices, territorial restrictions, exclusive draft accounts or central warehousing or anything else (Tr. 2512, 2513). No distributor has ever been threatened with the termination provision as far as any allegations contained in the Federal Trade Commission's Complaint are concerned (Tr. 2885). This fact was confirmed by all witnesses with the possible exception of Mr. Thurman whose credibility is in serious doubt by the undersigned.

The above findings are very comprehensive and are the result of a careful analysis of almost 3000 pages of testimony and approximately 4000 exhibits. Matters of this magnitude seem to of necessity contain a certain number of mechanical errors but it is hoped these have been kept to a minimum.

In making these findings of fact the undersigned has considered the whole record in this matter. This of course includes both oral testimony and admitted documents. The undersigned carefully observed all witnesses as they testified, paying particular attention to their appearance and conduct on the witness stand, their intelligence, motives, state of mind, ability to observe, their relation to each side of the proceeding, the consistency of their testimony, and the circumstances under which they testified. This analysis and study enabled the undersigned to judge credibility and give weight to the evidence in such a matter that this decision is supported by reliable, probative, and substantial evidence.

[Part 2, p. 1126]

LEGAL ISSUES

A principal issue presented in this case is whether the territorial restriction given to each Coors distributor in each distributorship in each distributorship agreement is a legal

vertically imposed restriction under the Federal Antittust Laws. It should be recognized at the outset that in one of the states in which Coors markets its beer, exclusive territories appear to be legally recognized and required. Idaho Code, Sec. 23-1003.

The Supreme Court held in White Motor Company v. United States, 372 U.S. 253 (1963) that the rule of reason is to be applied to antitrust cases involving vertical restraints as set forth in the cases of Chicago Board of Trade v. Unites States, 246 U.S. 231 (1919) and Standard Oil Company v. United States, 221 U.S. 1 (1910).

Following the White Motor decision came two decisions by Federal Courts of Appeals. In the first such decision, that of Snap–On-Tools Corporation v. F.T.C., 321 F.2d 825 (7th Cir. 1963), the Federal Trade Commission challenged the company's distributorship system. Among other things, the Federal Trade Commission alleged that the company required that its dealers should resell "respondent's products only within the geographical limits of the territory described in his agreement." 321 F.2d 827, N.2. The Company argued to the Court that its territorial exclusivity provisions were:

> . . . not only reasonable, but that the effects of the practice are not significantly anticompetitive. 321 F.2d at 832.

The Court of Appeals for the Seventh Circuit upheld the territorial restrictions under the rule of reason referring to the following as key items justifying such territorial exclusivity:

> . . . regular calls on customers, at the customer's places of business, by route salesman or dealers, are essential. 321 F.2d at 828.
>
> * * *
>
> . . . frequent assistance and guidance to the customer in the use and application of the tools is necessary, as is regular and unterrupted availability of

[Part 2, p. 1127]

service and replacement parts for the items supplied. 321 F.2d at 829.

* * *

The dealers are encouraged to call on every potential account in their territories, including industrial firms and the degree of their success is directly proportional to the thoroughness with which they cover the routes in their territories and the amount and quality of service they render their customers. 321 F.2d at 829.

The next Circuit Court case of importance following the White Motor case concerning vertical territorial restrictions was the case of Sandura Company v. F.T.C., 339 F.2d 847 (6th Cir. 1964). In this case, the Circuit Court found that:

. . . Sandura assigned defined geographical areas to its various distributors and such areas became "closed territories" in the sense that each distributor was permitted to sell Sandura products only within his assigned territory and only to retail dealers located therein . . . We hold that (such does not violate Section 5 of the Federal Trade Commission Act.) 339 F.2d at 849.

The Court of Appeals in Sandura found that the Company was failing economically and that in this background "some special inducement (was) necessary to attract distributors" for its products. 339 F.2d at 851. Sandura determined that the closed distributor territories were a significant part of the inducement needed to attract its distributors. The Court of Appeals in Sandura agreed that:

. . . Elimination of the closed territory arrangements would impair competition, rather than foster it. 339 F.2d at 859.

Then in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), a case involving horizontal restraints, the Supreme Court in dictum considered the validity of vertically

arranged territorial restrictions on the resale of commodities. In approaching a determination of the legal issues of the case, Justice Fortas writing for the Court stated as follows:

[Part 2, p. 1128]

> In White Motor Co. v. United States, 372 U.S. 253, 9 L.ed. 738, 83 S.Ct. 696 (1963), this Court refused to affirm summary judgment against the manufacturer even though there were not only vertical restrictions as to territory and customer selection but also unlawful price fixing. The Court held that there was no showing that the price fixing was "an integral part of the whole distribution system," and accordingly it declined to outlaw the system because of the possibility that a trial laying bare "the economic and business stuff out of which these arrangements emerge" might demonstrate their reasonableness. . . . So here we must look to the specifics of the challenged practices and their impact upon the market place[sic] in order to make a judgment as to whether the restraint is or is not "reasonable" in the special sense in which § 1 of the Sherman Act must be read for purposes of this inquiry. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 51 (1911); Apex Hosiery v. Leader, 310 U.S. 469, 498 (1940).

In Schwinn, the Court approached the legal issues involved from the standpoint of the decision in White Motor and the "rule of reason". The Court went on to hold that the consignment sales system used by Schwinn was not a per se violation of the Sherman Act. However, Justice Fortas in dictum, since the issue was not before him, commented on the contrasting situation where there is an outright sale of products:

> As the District Court held, where a manufacturer sells products to his distributor subject to territorial restrictions upon resale, a per se violation of the Sherman Act results. 388 U.S. at 379.

Federal Appellate Courts considering that issue subsequent to the Schwinn decision do not agree with complaint counsel's contention here that Schwinn provides a blanket per se rule against vertically imposed territorial restraints. In Janel Sales Corp. v. Lanvin Parfumes, Inc., 396 F.2d 398 (2d Cir. 1968), plaintiffs in a treble damage suit argued that a customer limitation clause in the agreement entered

[Part 2, p. 1129]

into by the defendant with others was a per se violation of the Sherman Act on the basis of Schwinn. The Court of Appeals held:

> . . . The existence of such a contractual clause does not necessarily imply a per se violation. In (Schwinn) the Supreme Court premised its finding of a per se violation on the fact that Schwinn has been "firm and resolute" in insisting on compliance. Here the evidence is conflicting on that issue. 396 F.2d at 406.

And in Tripoli Company, Inc. v. Wella Corp., 425 F.2d 932 (3rd Cir. 1970), the Appellate Court held that:

> It is clear that not all restraints in a system of distribution fall into the per se category. United States v. Arnold, Schwinn & Co., supra; White Motor Co.,[sic] v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.ed[sic]2d 738 (1963). Those condemned in Schwinn as per se violations were post-sale restrictions on the territory in which or the retailers to whom a wholesaler could resell. That case does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, Schwinn must be read, as must all antitrust cases, in its factual context. The context is a restraint on the territories in which and retailers to whom a wholesale purchaser may resell a bicycle, a product so simple in use that most ultimate consumers are children. No considerations other than marketing and

competition were advanced in Schwinn as justifications for the restraint. 425 F.2d at 936.

In Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. Claims 1971), the Court cited and followed Tripoli Co. v. Wella Corp., supra, concluding that:

> In Schwinn the Supreme Court "did not automatically outlaw any and all post-sale restrictions". Indeed, the restrictions in Tripoli were much stronger and more burdensome

[Part 2, p. 1130]

> than readily avoidable limitation involved here. 449 F.2d at 1380.

More recently, in the case of Anderson v. American Automobile Association, 454 F.2d 1240 (9th Cir. 1972) the Court held, concerning towing service contracts between the AAA and a number of towing services assigning exclusive territories within which the services were permitted to operate, on a take-it-or-leave-it basis:

> We view the restriction arrangements as solely the product of vertical agreements between the association and the individual contract stations as to which the rule of reason is applicable, [citing White Motor, supra].
>
> * * *
>
> The contractual arrangement is not per se or prima facie illegal (citing Schwinn, 399 U.S. at 375) 454 F.2d at 1246.

In its recent decision in United States v. Topco Associates, Inc., 5 CCH Trade Reg. Rep. 73,904 p. 91,746 (U.S. S.Ct. 1972) the Supreme Court had before it a horizontally arranged system of territorial restrictions on the resale of private brand groceries. The Department of Justice had asserted in a trail to the Federal District Court that such territorial restraints, horizontally induced were per se

violations under the Schwinn doctrine. U.S. v. Topco, Inc., F.Supp., 319 Supp. 1031 (N.D. Ill. 1970). The Federal Trial Court held, however, that such horizontally induced territorial restraints were pro competitive and valid under the Federal Antitrust Laws.

The Supreme Court adopted the distinction between vertical and horizontal territorial restraints, and held that such horizontally imposed territorial restraints were per se violations of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1. The Court held:

> It is only after considerable experience with certain business relationships that Courts classify them as per se violations of the Sherman Act . . . One of the classic examples of a per se violation of Section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal", in contradistinction to combinations of persons

[Part 2, p. 1131]

> of different levels of the market structure, e.g., manufacturers and distributors which are termed "vertical" restraints. This Court has reiterated time and time again that "horizontal territorial" limitations . . . are naked restraints of trade with no purpose except stifling of competition." 5CCH Trade Reg. Rep. at P. 91,751

The Court simply held that "it is clear" that the territorial restraint in that case is a "horizontal one" and therefore a "per se" violation of Section 1 of the Sherman Act.

The Court in Topco merely followed the decision in United States v. Sealy, 388 U.S. 350 (1967) to apply a well established, if narrow, "classic" exception to the rule of reason announced in Northern Pacific R.R. Co. v. United States, 356 U.S. 1, (1958). This classic violation referred to by the Court was the horizontal allocation of territories,

which it pointed out in Topco must be distinguished from vertical territorial restraints.

Mr. Chief Justice Burger, however, would consider abandoning the "classic" rule against horizontally imposed restraints which did not involve:

> restraints on interbrand competition or an allocation of markets by an association with a monopoly or near-monopoly control of the sources of supply of one or more varieties of staple goods. 5 CCH Trade Reg. Rep. p. 91,753.

Mr. Chief Justice Burger emphasized that horizontal restraints on the facts of that case would increase interbrand competition, and to prohibit that competition would result in a major clash of an antitrust policy:

> In the face of the District Court's well supported findings that the effects of such a rule in this case will be adverse to the public welfare, the Court lays down that rule without regard to the impact which the condemned practices may have on the competition. In doing so, the Court virtually invites Congress to undertake to determine that impact. 5 CCH Trade Reg. Rep. at 91,756.

The Federal Trade Commission staff has recognized in the Report of AD HOC COMMITTEE ON FRANCHISING issued June 2, 1969, that the Schwinn case is not a per se rule case. In

[Part 2, p. 1132]

that Report (RX 1080). Federal Trade Commission staff representatives concluded that Schwinn does not stand for the flat per se rule contended for here by counsel supporting the Complaint. In that report it was concluded that:

> . . . in Schwinn, the Court left enough leeway in its initial threshold test of the overall reasonableness of vertical arrangements to enable a manufacturer to justify

such an arrangement by establishing that it could not have entered the market or expanded its market share because of the impossibility of obtaining dealers willing to handle its products without some territorial protection, and by showing its inability to finance an effective agency – consignment arrangement (RX 1080, p. 30).

The record is clear that the Adolph Coors Company must have territorial restrictions to survive and stay in the beer industry, and is precluded by Federal and State Statutes from using consignment sales. See *infra*.

The Federal Trade Commission, itself, has not read the Schwinn decision as an absolute per se rule involving vertical territorial restrictions. Indeed, as recently as 1971 the Federal Trade Commission adopted the undersigned's decision, holding that it was an unfair trade practice under Section 5 of the Federal Trade Commission Act for a franchisor to misrepresent that a franchisee would be granted an exclusive territory in which to locate and sell products purchased from the franchisor, and promising a written agreement with a description of the size and limits of the exclusive territory so granted by the franchisor, unless in fact such exclusive territory was granted in writing as represented. In Re Universal Electrics Corporation, Inc., and Wendell Coker, Docket No. 8815, 1970, 3 UCC Trade Reg. Rep. 19,390, p. 21,515; adopted FTC, 3 UCC Trade Reg. Rep. 19,479, p. 21,556 (1971); Reh. den., 3 UCC Trade Reg. Rep. 19,595, p. 21,632 (1971). This reflects a long standing policy of the Federal Trade Commission authorizing and enforcing vertically imposed exclusive sales territories in the distribution of goods and services e.g., In Re Coradio, Inc., Dkt. No. 5717, 47 F.T.C. 311 (1949); In Re Sterling Materials Co., Inc., Dkt. No. 6426, 52 F.T.C. 909 (1955).

The territorial restrictions used by Coors are essential to obtain the market penetration and quality control standards required for Coors to maintain its hard-won competitive

position and to stay in the highly competitive brewing and beer distribution industry. Further, such restrictions are required by Coors to obtain competent distributors for its beer. Not only are the Coors distribution practices and procedures involving territorial restrictions upon resale of Coors beer necessary, they are pro-competitive from the standpoint of interbrand competition in the sale of beer. The dominion and control which Coors exercises over its beer, to protect the value of its trademark and the quality of its product, requires the imposition of the territorial restriction contained in its distributor contracts. This dominion and control results in a reduced risk of loss to the Adolph Coors Company.

It appears to the undersigned that the very recent case of LaFortune v. Ebie, 5 CCH Trade Reg. Rep. 74,090, p. 92,484 (Calif. Ct. App. 1972) correctly analyzes White Motor, Schwinn and Topco, supra, and when in citing from Topco the Court stated:

> The Court differentiated between horizontal territorial limitations, which it decalred to be automatic antitrust violation, and vertical territorial limitations, whose validity remains subject to a rule of reason 92,486.

The Court in LaFortune concluded its opinion by stating:

> Consequently, the restraint of trade is susceptible to justification under the rule of reason. It is possible that relevant factual distinctions between the food service industry and the bicycle industry in Schwinn may justify exclusivity of territory for delivery of product. For example, speed of delivery, quality of product, and condition of product at time of delivery may be factors which under the rule of reason could justify restraints of trade that would be unreasonable in the marketing of a standardized manufactured appliance. . . . these issues cannot be resolved on appeal, and opportunity to present and develop them can only be provided in a new trial. 92,486.

From time to time the Adolph Coors Company through its sales representatives has suggested and discussed wholesale pricing with certain of its distributors. When retail pricing is suggested to retailers, Coors Distributors almost

[Part 2, p. 1134]

without exception themselves recommend such pricing to their retail accounts. And, as stated in the findings, on occasions sales representatives of the Adolph Coors Company have recommended to retail accounts who are selling Coors beer below prevailing prices or cost that the Adolph Coors Company preferred to see the retailers sell Coors beer at a reasonable profit. At no time did the Adolph Coors Company threaten or coerce a retailer or Coors distributor in an effort to seek adherence to any suggested wholesale prices; nor is there any uniform adherence in fact to any wholesale or retail pricing suggestions of the Adolph Coors Company.

Coors, in the pricing area, whether at the wholesale or retail level, sought to persuade that price cutting to combat other price cutting in the industry is a foolish and unwise practice. Industry price cutting, initiated by manufacturers (Brewers) is of questionable legality when Brewers condition a price reduction, in whatever form, to their distributor and/or retailers in return for that distributor's or retailers' agreement to reduce price. Typically retailers do not cut prices unless receiving allowances from distributors, and distributors do not reduce prices to retailers unless the Brewer has reduced its price to the distributors. These price reductions are called "price promotions" and have been held to be illegal. Pearl Brewing Co. v. Anheuser-Busch, Inc., 5 CCH Trade Reg. Rep. 73,852, p. 91,575 (S.D. Tex. 1972). That court concluded in declaring the practice unlawful as price fixing banned by Section 1 of the Sherman Act:

> It is apparent from the voluminous records and testimony that the pricing independence of . . . wholesale distributors has been tampered with and consequently restricted. It is also apparent that the respective price promotions conducted by [Brewers] are extremely well-

> planned sales promotion programs which are created and conducted for the purpose of securing an increasingly larger share of the Texas beer market. Thus, the economic intentions and motives of [Brewers] are properly considered in such a light and not merely as efforts aimed at meeting existing competition in the marketplace. It is even more apparent after scrutiny of the many brewery price promotion forms which were submitted at the hearing that [Brewers] view price promotions primarily in terms of the price at which the beer is to be sold to retailers. Additionally, the resulting prices to wholesale distributors and to retailers, all of which are contained in

[Part 2, p. 1135]

> the price promotion forms, possess no consistent relationship to the supply and demand in the marketplace. At 91,584.

The lead antitrust cases over the last sixty years, e.g., Dr. Miles Medical Company v. John D. Park & Sons Company, 220 U.S. 373 (1911); United States v. Colgate and Company, 250 U.S. 300 (1919); United States v. A. Schroder's Son, Inc. 252 U.S. 85 (1920); Federal Trade Commission v. BeechNut Packing Company, 257 U.S. 441 (1922); United States v. Baush and Lomb Optical Company, 321 U.S. 707 (1944); United States v. Parke, Davis & Company, 362 U.S. 29 (1960), clearly indicate that a manufacturer may announce his policy, may discuss his policy with customers depending finally upon their voluntary acquiescence in the suggested policy and that such conduct is lawful under the Antitrust laws of the United States. It is when the manufacturer goes beyond the announcement of his policy and discussion of same on its own merits, and through coercive devices seeks or secures adherence to its policy, that a violation of the antitrust laws is made. As the Supreme Court stated in United States v. Parke, Davis and Company, supra, 362 U.S. 46-47:

> . . . if a manufacturer is unwilling to rely on individual self interest to bring about general voluntary

> acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice promoted alone by the desirability of the product. 362 U.S. 46-47.

The absence of coercive conduct, enforced adherence and the presence of voluntary acquiescence in Coors' suggestion by distributors and retailers, with significant pricing variation by other distributors and innumerable retailers without retaliation by Coors, clearly distinguishes the Coors policies and practices from that held illegal under the antitrust laws.

Moreover, in the face of some 70,000 retail accounts serviced routinely by all Coors distributors in the 11 state market territory, the Federal Trade Commission has sought to introduce the testimony of only two to support a finding of coercive retail price fixing by the Adolph Coors Company. Both instances of such alleged price fixing occurred years prior to the filing of the action by the F.T.C. herein. See in this connection United States v. Hudnut 8.[sic] F.2d 1010 (S.D. New York 1925) and United States v. Uniroyal, Inc., 300 F. Supp. 84 (S.D. New York 1969).

The termination by Coors of three distributors in 15 years where ample cause existed for such terminations, is similar to what the trial court in the Schwinn case specifically emphasized (which decision on this point was not appealed from by the Federal Government);

> This court is convinced and the record of the evidence shows that the defendant Schwinn devoutly hoped that its retail franchisees would hew close to the suggested price list, but it also shows that, whatever some officer or representative may have said or written, when retailers met competition in interbrand or even intrabrand bicycles, no action was taken by Schwinn or any of the distributors or agents of either. No one was refused bicycles and no franchises canceled. Price cutting was no

> doubt a factor in some cases where franchises of dealers in fair trade states were canceled, but in each case of franchise cancellation in evidence there were several other good and sufficient grounds for the cancellation. United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 331-32 (N.S. Ill. 1965).

Complaint counsel allege that the termination provisions in the distributorship contracts between the Adolph Coors Company and its distributors are unlawful. The generally accepted view is to the contrary. Professor Corbin states that:

> A power to terminate in case performance is not satisfactory may be expressly reserved without invalidating the contract, whether the satisfactoriness is to be determined by a party to the contract, by his engineer, or by a stranger. 6 Corbin on Contracts (1962) 1266, at pp. 65-66.

Applications of these familiar legal principals[sic] are Ricchetti v. Meister Brau, Inc. 431 F.2d 1211 (9th Cir. 1970), Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), Quinn v. Mobil Oil Company, 375 F.2d 273 (lst Cir. 1967), Amplex of Maryland, Inc. v. Outboard Marine Corp., 380 F.2d 112 (1967), Klein v. American Luggage Works, 323 F.2d 787 (3rd Cir. 1963), and more recently Cartrade, Inc. v. Ford Advertising Assoc. of So. Calif., 446 F.2d 289

[Part 2, p. 1137]

(9th Cir. 1971) and Bushie v. Stenocord, 5 CCH Trade Reg. Rep. 73,896, p. 91,717 (9th Cir. 1972) where the court stated:

> It is well settled that a manufacturer may discontinue dealings with a particular distributor "for business reasons which are sufficient to the manufacturer . . ." 5 CCH Trade Reg. Rep. at 91,718.

and:

> Nor does the fact that Bushie presented evidence that he had been a good dealer for Stenocord tend to show that

Stenocord cancelled his dealership with an intent to restrain trade. 5 CCH Trade Reg. Rep. at 91,719,[sic]

Congress enacted the Federal Alcohol Administration Act, precluding consignment sales in the distribution of alcoholic beverages, 27 U.S.C.A. 205 (f), provided that states follow-up by enacting similar restrictions, 27 U.S.C.A. 205 (f). Only one (Nevada) of the eleven states in which Coors beer is sold has failed to ban consignment sales or related financing arrangements in the distribution of beer.

Arizona Ariz. Rev. Stat. Ann. 4-243 (2) (1956)
California Cal. Bus. & Prof. Code 25500, 25501, 25502, 25503, 25505 (West. Supp. 1971)
Colorado Colo. Rev. Stat. Ann. 1963 75-1-8; 75-2-15 (1) (a), (b) (Supp. 1969).
Idaho Idaho Code 23-1031, 23-911, 23-912 (1968)
Kansas Kan. Stat. Ann. 41-704 (1964)
New Mexico N.M. Stat. Ann. 46-9-8(b) (1953)
Oklahoma Okla. Al. Bev. Cont. Bd., Rules & Regulations Art. 3, Sec. 11, Sec. 12.
Texas Tex. Penal Code Art. 666-3 (a) (2) 666-53, 667-24 (1952)
Utah Regulations, Utah Liq. Cont. Comm., regulation no. 7

[Part 2, p. 1138]

Wyoming Wyo. Stat. Ann. 12-22, 23 (1957)

Nothing in the Twenty-First Amendment exempts the conduct of respondent from action by the Commission. In United States v. Frankfort Distilleries, 324 U.S. 293 (1945), the Court held that the Twenty-First Amendment did not of itself, bar a prosecution under the Sherman Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado. Accordingly, there is no foundation or justification for Respondent's conclusion that the Twnety-First Amendment bars any action by the Federal Trade Commission. Of course, this does not affect the operation of Federal and State "fair trade" legislation.

The Supreme Court has said that "as a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." Utah Power Light Co. v. United States, 243 U.S. 389 (1917). See also, United States v. Reading Co., 226 U.S. 325 (1912).

The Complaint alleges and respondent denies that respondent and respondent's unfair methods of competition and unfair acts and practices are "in commerce" as "commerce" is defined in the Federal Trade Commission Act.

The operation of respondent's business and its acts and practices provide a firm basis for concluding that respondent's acts and practices are "in commerce". Although the beer is sold F.O.B. Golden, Colorado, respondent schedules beer shipments and ships its beer to distributors located in ten other states. Respondent has sales representatives traveling throughout its 11 state area and monitoring its distributors.

Respondent has admitted that it operates "in commerce". To the U.S. District Court for the Northern District of California, respondent has stated that it does business in California and sells beer in interstate commerce (CX 354A). In obtaining licenses to transact businesses in various states, respondent admits to doing business in those states. Clearly, therefore, respondent is "in commerce" for the purpose of this proceeding.

[Part 2, p. 1139]

CONCLUSIONS

1. The territorial restrictions vertically imposed by the Respondent upon its distributors, are reasonable and essential to achieve market penetration and quality control, the factors that enable the Respondent to stay in and survive in the highly competitive beer industry, thereby promoting vigorous interbrand competition. This conduct on the part of the Respondent does not violate Section 5 of the Federal Trade Commission Act.

2. Respondent's conduct and activities in suggesting wholesale prices or ranges of prices to its distributors, and on isolated occasions retail prices, are not agreements, are not accompanied by refusals to deal or by threats, coercion, or intimidations of any kind, depend upon voluntary acquiescence, and are not uniformly followed. This conduct on the part of the Respondent does not violate Section 5 of the Federal Trade Commission Act.

3. Respondent, in the sale of its draft beer, either by itself, through its distributors, or in combination with its distributors, does not sell its draft beer upon the condition that said beer shall be sold by the particular outlet to the exclusion of all other brands of draft beer. This conduct on the part of the Respondent does not violate Section 5 of the Federal Trade Commission Act.

4. Respondent's refusal to sell to central warehouse accounts, and its recommendation to its distributors that they also refuse to sell to said accounts, using instead direct delivery just as they use with all other retail outlets, is not accompanied by threats, coercion, or intimidation of any kind, is not a customer restriction, and is reasonable so as to protect the quality and image of its product. This conduct on the part of the Respondent does not violate Section 5 of the Federal Trade Commission Act.

5. The termination provisions of Respondent and its distributors based upon their contractual obligations, are a matter of private contract, not subject to interference by third parties, are reasonable, and have never been used by the Respondent to force unlawful conduct. All terminations of distributors by the Respondent have been for legal cause, based upon good and sufficient grounds in accordance with the distribution contract. This conduct on the part of the Respondent does not violate Section 5 of the Federal Trade Commission Act.

[Part 2, p. 1140]

6. The conduct of the Respondent as shown by the evidence is reasonable, pro-competitive, and not in violation of Section 5 of the Federal Trade Commission Act.

7. Respondent is "in commerce" as defined by the Federal Trade Commission Act.

8. The Twenty-First Amendment to the Constitution of the United States of America does not give the individual sovereign states the exclusive authority and regulation concerning intoxicating liquors therein.

9. The Federal Trade Commission conducted its investigation, filed the Complaint, and prosecuted the action with diligence.

10. The Commission's attempted interference with Respondent's distribution contracts in the areas of central warehousing, territorial restrictions, and termination provisions, if successful, would violate Respondent's liberty and property rights as guaranteed by the Fifth Amendment to the Constitution of the United States of America.

11. Commission counsel have not established by the preponderance of the reliable and probative evidence the allegations of the complaint set forth at the beginning of this Initial Decision.

ORDER

IT IS ORDERED that the complaint herein be, and it hereby is, dismissed.

/s/ Walter R. Johnson,
Administrative Law Judge.

September 15, 1972.

Received September 15, 1972.

Filing Date not available.

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* * *

APPENDIX D

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

1. **Fifth Amendment, United States Constitution.**

The Fifth Amendment to the Unites States Constitution provides in relevant part as set forth at U.S.C.A. Const. Amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

2. **Federal Administrative Procedure Act, 5 U.S.C. §551, et. seq.**

The Federal Administrative Procedure Act, 5 U.S.C. §551(1) defines pertinent terms as follows:

> For the purpose of this subchapter –
>
> (1) "agency" means each authority of the government of the United States, whether or not it is within or subject to review by another agency . . . .
>
> * * *
>
> (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
>
> (12) "agency proceeding" means an agency process . . .; and
>
> (13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

The Federal Administrative Procedure Act provides for adjudications as follows in 5 U.S.C. §554:

> (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . .
>
> * * *
>
> (b) Persons entitled to notice of an agency hearing s[illegible] be timely informed of –
>
> (1) The time, place, and nature of the hearing;
>
> (2) The legal authority and jurisdiction under which the hearing is to be held; and
>
> (3) The matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

> (c) The agency shall give all interested parties opportunity for –
>
> (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, of the nature of proceeding, in the public interest permit; and
>
> (2) To the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

> (d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency . . . .

The Administrative Procedure Act regulates the procedure to be followed in any hearings conducted by an agency in 5 U.S.C. §556 as follows:

> (a) This section applies, according to the provisions thereof, to hearings required by section . . . 554 of this title to be conducted in accordance with this section.
>
> (b) There shall preside at the taking of evidence –
>
> (1) The agency;
>
> (2) One or more members of the body which comprises the agency; or
>
> (3) One or more hearing examiners appointed under section 3105 of this title.
>
> * * *
>
> (c) Subject to published rules of the agency and within its powers, employees presiding at the hearings may –
>
> (1) administer oaths and affirmations;
>
> (2) issue subpoenas authorized by law;
>
> (3) rule on offers of proof and receive relevant evidence;
>
> (4) take depositions or have depositions taken when the ends of justice would be served;
>
> (5) regulate the course of the hearings;

(6) hold conferences for settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

The Federal Administrative Procedure Act in 5 U.S.C. §557 controls the procedure by which a hearing examiner renders a recommended or initial decision as follows:

> (a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially deicde the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision . . . .
>
> * * *
>
> (c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decision –
>
> (1) proposed findings and conclusions; or

> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are part of the record and shall include a statement of –

> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

The Federal Administrative Procedure Act also governs judicial review of agency action and final orders, 5 U.S.C. §701 and §702. In section 706 the scope of such judicial review under the Federal Administrative Procedure Act is set forth as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) Compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. **Federal Trade Commission Act, 15 U.S.C. §41 et. seq.**

The Federal Trade Commission Act in 15 U.S.C. § 45(b) provides for the issuance of complaints and the conduct of hearings:

> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and

> at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint . . . . The testimony in any such proceeding shall be reduced to writing and filed in the Office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by Sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside in whole or in part, any report or any order made or issued by it under this section.

The Federal Trade Commission Act provides that after the Federal Trade Commission has issued a cease and desits order, the corporation subject to the Order may petition for a review thereof in the appropriate United States Court of Appeals. This is set forth in 15 U.S.C. §45(c) as follows:

> (c) Any person, partnership, or corporation required by an order of the Commission to cease

and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its finding as to the facts, or make new findings, by reason

> of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for a modification or setting aside of its original order, with the return of such additional evidence. The judgment and the decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

The Federal Trade Commission Act in 15 U.S.C. §45(g) and (h) provides for the finality of Commission orders as follows:

> (g) An order of the Commission to cease and desist shall become final –
>
> (1) Upon the expiration of the time allowed for filing petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last section of subsection (b); or
>
> (2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or
>
> (3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or
>
> (4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to a court with the mandate, in which event the order of the Commission shall become final when so corrected.

4. Federal Trade Commission Rules of Practice For Adjudicative Proceedings, 16 C.F.R. §3.51 et. seq.

§3.51 (a) *When filed and when effective.* The administrative law judge shall file an initial decision within ninety (90) days after completion of the reception of evidence, or within thirty (30) days after a default or the granting of a motion for summary decision or waiver by the parties of the filing of proposed findings of fact, conclusions of law and order, or within such further time as the Commission may by order allow upon written request from the administrative law judge. The initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of notice of appeal, whichever shall be later, unless in the interim a party filing such a notice shall have perfected an appeal by filing an appeal brief, or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

(b) *Content.* The initial decision shall include a statement of (1) findings (with specific page references to principal supporting items of evidence in the record) and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) an appropriate rule or order. The initial decision

shall be based upon a consideration of the whole record and supported by reliable, porbative, and substantial evidence.

(c) *By whom made.* The initial decision shall be made and filed by the administrative law judge who presided over the hearings, except when he shall have become unavailable to the Commission.

* * *

§3.54 (a) Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision.

(b) In rendering its decision, the Commission will adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions.

APPENDIX E

THE REMARKS IN THIS STATEMENT REPRESENT ONLY THE VIEWS OF A MEMBER OF THE FEDERAL TRADE COMMISSION STAFF. THEY ARE NOT INTENDED TO BE, AND SHOULD NOT BE CONSTRUED AS, REPRESENTATIVE OF AN OFFICIAL COMMISSION POLICY.

STATEMENT OF

JAMES T. HALVERSON
DIRECTOR
BUREAU OF COMPETITION
FEDERAL TRADE COMMISSION

IN OPPOSITION TO
ENACTMENT OF S.978, H.R. 122, AND H.R. 10014

BEFORE THE
SUBCOMMITTEE ON COMMERCE AND FINANCE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

JUNE 27, 1974

I am pleased to appear before this distinguished Subcommittee to present the views of the Federal Trade Commission's Bureau of Competition concerning the proposed legislation which is the subject of these hearings. Due to the pendency of adjudicative matters concerning territorial restrictions in the soft drink industry, neither the Commission nor any individual Commissioner has passed upon or approved this statement. Two of the bills which the Committee is presently considering, H.R. 122 and S. 978, provide, in essence, that restrictions which prevent sellers of trademarked food products (soft drinks only in the case of S. 978) from competing outside geographically limited territories shall be deemed lawful under certain circumstances. The third, H.R. 10014, provides similar statutory treatment for exclusive territorial agreements on trademarked private label food products distributed by voluntary or cooperative food associations. I shall devote most of my remarks to H.R. 122 and S. 978 since the Commission has the soft drink cases pending in this area, but will also offer my comments on the desirability of legislation like that contained in H.R. 10014.

H.R. 122 and S. 978

In the opening part of this statement, my comments shall be referenced more to the effects of an antitrust exemption for territorial restrictions in the soft drink industry (S. 978) than to the provisions of H.R. 122 which would grant such exemptions throughout the entire food products industry. This is because there are eight cases now being prepared for trial by the staff of the Bureau of Competition which challenge the legality of territorial restrictions in the soft drink industry under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).*

Since the Bureau's position is one of fundamental opposition to an antitrust exemption for territorial restrictions in the soft drink industry, it logically follows that our position is also one of complete opposition to H.R. 122

*Docket Nos. 8853-59, 8877.

where the objectionable effects of such legislation would be felt throughout the entire food products industry.

In light of the eight soft drink cases which are in various stages of pretrial preparation, one might argue that my position as an advocate with respect to these cases precludes me from viewing the proposed exemptions objectively. Since, however, these cases originated before I became Director of the Bureau, I can safely say, after reviewing the history of these cases and the positions of the soft drink industry which were tendered in the Senate hearings on S. 978, I am in a position to respond objectively to the major concerns which the soft drink industry has expressed.

One of the principal considerations which was advanced by the industry in justification of this legislation was the argument that the Commission's soft drink cases were being presented on a *per se* theory of unlawfulness. More particularly, it was argued that the effect of proceeding under this theory was to preclude the respondents in these cases from presenting any defenses based upon alleged procompetitive effects of the territorial restrictions and from offering any legitimate countervailing business justifications therefor. The soft drink industry also contended that such a *per se* theory can be oppressive in that the Commission would have less discretion in fashioning a remedy than if it were to proceed under rule of reason analysis.

The types of agreements which are under challenge have been in effect in some instances for over three-quarters of a century and, over the years, have been considered by some to be economically desirable and lawful. In this historical context, the view that anything less than an examination of the full range of relevant factors relating to both conduct and remedy might possibly give rise to an unjust result cannot be rejected out of hand. This position is not devoid of merit.

The most important point that I should leave you with is that the Bureau of Competition is no longer proceeding on the *per se* theory of unlawfulness which the industry has found so objectionable. Our new trial team has elected to

revise both theory and evidentiary presentation and to try these cases on a "rule of reason" basis. This means that the respondents will be able to present by way of defense, within recognized judicial limits, evidence of procompetitive effects or business justification for the challenged agreements which they deem appropriate. Many of the arguments which were advanced before the Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary were necessarily advanced there because they could not have been received by the Administrative Law Judge under a *per se* theory. Under the original *per se* approach, Congress offered the only forum in which the soft drink industry could present arguments and evidence justifying these arrangements.

All of that has changed. And it is these changed circumstances which form our most important basis for objecting to the proposed legislation. While this Committee and the Congress certainly have the authority to evaluate the issues insofar as these agreements are concerned, I would respectfully suggest that a Committee hearing is not the best forum in which to render a judgment which attempts to balance the varied and complex business/consumer interest equations which must be thoroughly evaluated in an antitrust context. I submit, with great respect for this Committee, that the Federal Trade Commission, as a body with legal and economic experts, is the best possible forum in which to resolve the issues as to whether territorial restrictions in the soft drink industry should continue to be acceptable or whether the public interest requires that the relationships between manufacturers of these products and their distributors should be reconsidered.

I believe the Committee should also take note of a related procedural facet of the Commission's soft drink cases which supports my contention that the legality of territorial restrictions in the soft drink industry should be resolved by the Federal Trade Commission. When these cases were originally brought, only the soft drink concentrate companies were named as respondents. The franchised bottlers (the other parties to the agreements) were not named as parties. Since the provisions of the challenged agreements granted

substantial rights to the soft drink bottlers, and since their interests might not always be coextensive with the interests of the concentrate companies, many bottlers felt that the failure of the Commission to name them as respondents deprived them of an opportunity to present evidence and defend their rights in a fair hearing. While various bottler associations had been permitted to intervene in the formal proceedings, there was some reason to believe at the outset that this intervention would be permitted only on a somewhat limited basis.

I am pleased to bring to the Committee's attention the fact that this situation has also been changed. Our trial team has voluntarily accorded the intervenors in the Coca-Cola case*, consisting of the Coca-Cola Bottlers' Association and certain named bottling companies, full participation with defensive rights substantially coextensive with those of the named respondents. Last January, the staff tendered a revised pretrial submission consisting of copies of all documents and summaries of expected testimony of all witnesses to be called in the Coca-Cola case not only to the named respondents in that case but also to intervenors' counsel. Thus, the intervenors, as well as the named respondents, are in a position to know the nature of the evidence to be offered in support of the Commission's case-in-chief, and the bottlers, as well as the named respondents, will be able to prepare their defenses and to offer evidence which they deem necessary and appropriate to protect their positions in a rule of reason context.

Aside from our opposition to the proposed legislation on the grounds that it is both unnecessary and undesirable in light of the present posture of our pending adversary cases, antitrust exemptions in the food and soft drink industries are objectionable for a number of additional reasons.

Notwithstanding suggestions to the contrary, the proposed legislation is not consistent with a true rule of reason resolution of the issues. Under the provisions of both bills the presence of "free and open competition" (H.R. 122) or "substantial and effective competition" (S. 978) constitutes

*Docket No. 8855.

an absolute defense. Stated another way, the legislation is loaded in favor of business interests because it forecloses from consideration relevant factual areas which can be characterized as reflecting areas of countervailing consumer concern. For example, as I shall indicate in more detail later in this statement, the test in the proposed bill would substitute an assessment of the existence of interbrand competition for the more relevant assessment, in the case of high volume, brand-name products, of the effects on consumers of the absence of intrabrand competition.

In addition, most of us will agree that there is a pressing need to conserve energy, particularly gasoline supplies. The cost of fuel to move products by truck transport has increased significantly, and we may see further increases in the near future. Consumers and retailers who supply consumers with food products are entitled to be given a freedom of choice to have food products delivered by suppliers in a manner which conserves energy and presumably lowers the price which the end user must pay.

The territorial restrictions in the soft drink industry preclude, for all intents and purposes, deliveries of soft drink products to central warehouses. Fuel wasting store-door-delivery methods are prevalent in geographically narrow franchise territories. A true rule of reason approach would allow the adjudicating authority to give appropriate weight to this circumstance. The proposed legislation, on the other hand, would absolutely prohibit any consideration of this highly relevant factor which is important to consumers and public interest.

While territorial restrictions in the soft drink industry have been with us for many years, one can perceive a definitive movement away from rigid, inviolate exclusive sales territories.

In many situations, territorial restrictions are unnecessary given the number of lawful alternative marketing strategies available. Generally, the legitimate marketing needs of business can be met by manufacturer-distributor agreements

less restrictive of competition, such as distributorship arrangements which do not restrict distributors from selling outside their territories but assign areas of primary responsibility and the use of location clauses. Each of these alternatives provides business with some of the benefits of market penetration and protection of goodwill, but at less risk to competition and the consumer. If technology changes or if a distributor seeks to set prices at higher than competitive levels, the aforesaid alternatives would permit sales to flow across the former territorial boundaries and correct imbalances. In this connection, the remedy fashioned by the District Court and affirmed by the United States Supreme Court in the *Topco* case is instructive.* After considering all relevant market factors facing the cooperative grocery chain, the District Court in that case permitted both the use of location clauses and the assignment of areas of primary responsibility.

The Commission's proceedings do not, of course, challenge the lawfulness of a concentrate manufacturer's restricting a bottler to a particular manufacturing location, or the right of a concentrate manufacture to select its own bottlers. The business advantage of a bottler being the designated *manufacturer* of a particular brand located in a particular area will remain.

However, territorial restrictions on where the bottlers may sell are not only unnecessary from a business standpoint but also their cost to the consumer may be so great as to make them totally intolerable. Since the soft drink market amounts to $5 billion in retail sales per year, even a one percent reduction in prices to the consumer caused by effective intrabrand competition would save the consumer $50 million each year. Since these bills would legalize territorial restrictions not only in the soft drink industry, but also in the entire $131 billion food industry, the potential adverse effect on the consuming public could be enormous.

United States v. *Topco Associates, Inc.*, 414 U.S. 801 (1973), aff'g 1973-1 Trade Cases ¶74,485 (N.D. Ill. 1973), on remand from 405 U.S. 596 (1972), rev'g 319 F. Supp. 1031 (1971).

While the proposed legislation is attempted to be justified in the name of small business protection, a critical appraisal of the facts finds little, if any, support for such a proposition.

An examination of the type of corporations engaged in soft drink bottling reveals that small and medium-sized, single-plant bottlers are becoming increasingly less significant factors in this business, Many plants are still small and locally owned; however, the importance of such bottlers is vastly overstated by a mere examination of the number of plants they operate. Small bottlers account for a small and decreasing share of soft drink *sales*, the relevant measure of industry concentration. With the decreasing importance of small bottlers, three types of firms have come to dominate soft drink bottling:

1. Wholly-owned bottling and canning operations of the concentrate manufacturers;

2. Bottling plants owned by large conglomerate corporations; and

3. Large, multiplant bottling companies.

Firms of these three types accounted for 62.5% of total industry sales in 1967, the last year for which data are available. The 1972 Census will undoubtedly show a much higher percentage of the market dominated by these large companies in view of the significant number of mergers and acquisitions in the industry since 1967. Since 1958, when relevant data first became available, the precentage of total industry sales accounted for by all multiplant bottlers has steadily increased from 43.3% in 1958, to 50.9% in 1963, and, most recently, to 52.5% in 1967.*

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*Calculated from data contained in: Bureau of the Census, *1967 Enterprise Statistics*, 330. Bureau of the Census, *1963 Enterprise Statistics*, 94. Bureau of the Census, *1958 Census of Manufacturers*, Vol. 1, 3-7.

Annual surveys by an industry trade journal, *Soft Drinks*, document the rapidly increasing importance of large bottling plants, and the even more rapidly declining importance of small and medium-sized plants. The number of soft drink bottling plants dropped from 3,501 in November 1968, to 2,990 in November 1971. During this time, the percentage of total soft drink sales accounted for by plants with an annual sales volume of over $2 million increased from 54% to 69%, while the percentage of total soft drink sales accounted for by plants with annual sales volume of $500,000 or less fell from 16% to 10%.*

Seven of the eight largest concentrate manufacturers have large bottling facilities located in major markets. The Coca-Cola Company owns and operates bottling facilities serving such major U.S. cities as Chicago, Milwaukee, San Francisco, Seattle, Oakland, San Jose, Baltimore and Boston. Twenty-eight million people reside in areas of the country in which Coca-Cola brands are bottled *exclusively* by the Coca-Cola Company.** Similarly, the second largest supplier of soft drink syrup, PepsiCo, Inc., operates bottling facilities in such areas as New York City, Boston, Milwaukee, and the entire state of Michigan. Forty-six million people live in areas of the country in which Pepsi-Cola brands are bottled *exclusively* by PepsiCo.***

The soft drink companies serving the greatest portion of the United States population are large firms located in metropolitan areas. Among such large multiplant bottlers are the Coca-Cola Bottling Company of New York, the Coca-Cola Bottling Company of Los Angeles and Allegheny Beverage Corp.

In addition, by virtue of acquisitions, several conglomerates are among the largest bottlers in the country: Westinghouse Electric Corp., Beatrice Food Co., Illinois

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*Soft Drinks, January, 1969, at 35. *Soft Drinks*, January, 1974 at 30.

**1970 Census of the Population.

***1970 Census of the Population.

Central Industries, Inc., General Tire and Rubber Co., Borden, Inc., Wometco Enterprises, Inc. and General Cinema.

Because such large firms engage in soft drink bottling, high concentration levels exist in this industry. Approximately 40 bottlers account for more than one-third of total soft drink sales.*

However, the relevant measure of concentration in soft drink bottling is concentration in local markets. Local markets, not national markets, are the locus of competition in soft drink bottling, as territorial restrictions confine bottlers to competing in local markets. To put it simply, bottlers compete on the local level, not on the national level, and concentration of sales among local bottlers is high. According to the Bureau of Census, in 1963, the four largest bottlers in nine large metropolitan areas had, on the average, 68% of the market.** This high concentration level among bottlers at the local level parallels the high concentration level of the four largest syrup manufacturers who share about 70% of the national market.

One reason for the high local concentration among bottlers is the extent to which bottlers produce products of several syrup manufacturers. For example, in New York City, both Coca-Cola and Dr. Pepper products are marketed by Coca-Cola Bottling Co. of New York. Certainly, there can be no real competition between these brands bottled by a common bottler since one can assume that a firm is not going to engage in price competition with itself. In 1970, of the 1,654 bottlers of products of the eight largest concentrate manufacturers, 738 bottled products of more than one such

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*Bureau of the Census, *Annual Survey of Manufacturers: 1970 Value-of-Shipment Concentration Ratios*, Table 4, at 8.

**Bureau of the Census, *Concentration Ratios in Manufacturing Industry*, 1963, Part II of Report Prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 90th Congress, 1st Session, Washington, D.C., 1967, Tables 25 and 26.

manufacturer.* Because of the large number of bottlers which bottle more than one brand, effective competition between different brands does not exist.

Many bottlers can economically serve much larger geographic markets than the artificial territories which their bottler contracts limit them to serving. Within these larger market areas, neighboring bottlers sell the same brand of soft drink at prices which may vary by as much as 30%. If territorial restrictions are removed, food wholesalers and retailers would be free to shop around and purchase soft drinks from the bottler of a particular brand who offered the lowest price and/or best service. As a consequence, soft drink prices in the market areas would gravitate toward the lower prices and service would be improved. Competition at the distribution level would mean that food wholesalers and retailers could purchase from the lowest-priced bottler and pass on much of the savings to consumers.

One available method of distribution for soft drinks is central warehouse delivery to food retailer co-operatives, food wholesalers and food chains. This is the method of distribution used for the preponderance of the processed food products sold in food stores. All we advocate is that retailers, wholesalers and bottlers be permitted to decide which distribution system they prefer rather than having that decision made for them by the concentrate manufacturers. To the extent that central warehousing offers any cost advantages, it benefits small and large bottlers and small and large retailers alike.

Predictions of doom for small bottlers without territorial protection are questionable if one considers the success of small business distributors in other industries which do not have such restrictions. The assumption that territorial protection preserves small businesses has no more validity for the soft drink industry than it does for any other businesses. That territorial restrictions have not helped smaller bottlers is apparent from the rapid decline of these bottlers in recent

* Compilation from *1971 United Beverage Bureau Book*.

years. From about 5,200 firms, in 1947*, the number of bottling companies has declined to 2,300 in 1970, and only 1,600 of these bottle one or more of the eight major brands.** This steady and accelerating decline in the number of small bottlers, in recent years, the loss of market share to private brand bottlers, and other similar developments well illustrate the present vulnerability of those small bottlers whose territories limit their competitive capabilities.

Survival or success under the present territorially limited system, thus, may not depend on a bottler's industry, judgment, or skill, the economies of his operations, or the quality of his service, as much as it does on the boundaries of his territory. Proscribing competitive opportunities for growth cannot really protect the inefficient, even if that is desirable; such restrictions do limit the competitiveness of the efficient and aggressive large and small bottlers, and that certainly is undesirable.

Many small bottlers today serve territories so limited that they cannot even maintain one bottling line of minimum efficient size that operates five days per week. Such bottlers have rapidly been exiting from the market, usually selling their franchises to nearby large bottlers, which simply liquidate the acquired plants and serve the additional market from their existing plants.

Some small bottlers have the ability to serve much wider areas than those to which they are currently restricted. This is due to the great changes in transportation and distribution

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*Bureau of the Census, *Concentration Ratios in Manufacturing Industry, 1973*, Table 2, p. 8, Part I of the Report prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 90th Congress, 1st Session, (1967).

**Compiled from 1971 *United Beverage Bureau Book*, *supra*, note 7.

systems which have taken place since the territorial boundaries were established. A 1965 study by the National Soft Drink Association stated:

> "Many of today's franchise boundaries, while well-suited to earlier modes of transportation have become too small to allow individual bottlers to capitalize on established retail trading area."

Therefore, territorial restrictions in the soft drink industry have actually contributed to the decline in the number of bottlers. Small bottlers have been denied the opportunity of expanding their sales and growing to efficient size. Consequently, they have been induced to leave the industry. If the territorial restrictions are removed, small bottlers will be given an opportunity to expand their operations to the point at which they can support an efficient plant. Enactment of the proposed legislation may aid small bottlers seeking to sell their businesses to large bottlers; however, it will adversely affect those small businessmen who desire to continue to compete in the bottling business.

To summarize and conclude, the Bureau of Competition opposes enactment of H.R. 122 and S. 978 for the reasons that:

1. The appropriate forum to resolve the issues is the Federal Trade Commission, which, as a body of experts, is peculiarly qualified to weigh all relevant facts in a true rule of reason context and fashion a just remedy, if there be need for one.

2. The proposed bills are loaded in favor of business interests and contrary to the interests of consumers in that the measures provide absolute defenses to territorial arrangements which preclude consideration of relevant factors, such as fuel conservation and delivery efficiency which are both relevant and material to the issues under consideration.

3. The legislation is unnecessary and unwarranted in the light of viable and lawful business alternatives to territorial restrictions.

4. The cost to the consuming public of territorial restrictions is so great that it constitutes an unreasonable and unacceptable burden which cannot be justified in theory or in fact.

5. Contrary to some suggestions, the legislation will not protect small business to any significant degree.

6. Territorial restrictions inhibit modest economies of scale and other efficiencies in operation and render suppliers impervious to the desires and needs of their customers.

H.R. 10014

This bill, applying only to voluntary or cooperative food associations, would, like S. 978 and H.R. 122, legalize the use of agreements which restrict the geographic areas in which business can compete. My statement in opposition to this bill will be brief, given the comments to be submitted to this Committee by the Antitrust Division, which has particular experience and expertise in this area.

The Bureau of Competition is in fundamental opposition to this bill because, like the two other proposals being considered today, it goes far beyond a return to the traditional antitrust "rule of reason." The bill provides that territorial restrictions on members of food cooperatives or associations are lawful so long as "substantial and effective" product and vendor competition exists. The inclusion of references to both product and vendor competition does not suggest unrestrained competition, but rather simply the presence of two or more products or vendors in the same market area. Because this language is untested in the courts, the bill poses an unnecessary risk to the American consumer. Furthermore, the effect of this bill is to place the burden of

proving the anticompetitive effects of the restrictions on the antitrust enforcement agencies rather than requiring those with the best knowledge of the industry, in this case the association, to come forward and demonstrate the pro-competitive effects of the practices.

Finally, I submit that it has not yet been shown that the less restrictive marketing and distribution practices, approved by the District Court in the *Topco* case only last year, will not meet the legitimate business needs of the cooperative food associations. If practices such as assigning areas of primary responsibility and the use of location clauses are proven to be unsuccessful, then the Bureau may reassess its position and submit new legislative recommendations which would protect both the consumer and the legitimate marketing needs of the voluntary food cooperatives.

This concludes my prepared statement. I will be pleased to answer any questions you may have or provide the Committee with such further information as it may desire.